(25,318)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 497.

HENDERSONVILLE LIGHT AND POWER COMPANY AND SALUDA-HENDERSONVILLE INTERURBAN RAILWAY COMPANY, PLAINTIFFS IN ERROR,

vs.

BLUE RIDGE INTERURBAN RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 27, 1916.

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1 Supreme Court of the United States.

No. —.

HENDERSONVILLE LIGHT AND POWER COMPANY and SALUDA-HENDERSONVILLE INTERURBAN RAILWAY COMPANY, Plaintiffs in Error,

vs.

BLUE RIDGE INTERURBAN RAILWAY COMPANY, Defendant in Error.

Petition for Writ of Error.

To the Honorable Chief Justice of the Supreme Court of North Carolina:

The petitioners, Hendersonville Light and Power Company and Saluda-Hendersonville Interurban Railway Company, respectfully show that at the November Term, 1914, of the Superior Court of Henderson County, North Carolina, a court of general jurisdiction, a judgment was rendered against your petitioners in a certain cause therein pending, wherein the Blue Ridge Interurban Railway Company was plaintiff and your petitioners were defendants, adjudging that the lands, rights, water powers and property of your petitioners be condemned to the use of the defendant in error for the following purposes:

"(*a*) To build, own, maintain and operate a street and interurban railway from the City of Hendersonville through the town of Flat Rock and Saluda to a point on Green River at or near the mouth of Big Hungry Creek in Henderson County, together with the power to build and extend its railway lines to any other point or points not exceeding fifty miles from the town of Saluda;

2 "(*b*) To erect and maintain a water power plant on Green River between Big Hungry Creek and Henderson Island for the purpose of generating electricity to be used in operating said railway;

"(*c*) To have all other powers granted by the laws of North Carolina to corporations of this character, including all rights of condemnation and the right to sell and dispose of the surplus electric power generated at its power plant and the right and power to erect and maintain poles and tower lines, wires and all other structures, fixtures and appliances necessary to convey its power wherever needed and desired;

"(*d*) To construct, equip and maintain buildings, works, factories and plants; to install, maintain and operate all kinds of machinery and appliances; to operate same by hand, steam, water,

electric or other motive power, and generally to perform all acts which may be deemed necessary or expedient for the proper and successful prosecution of the objects and purposes for which the corporation is created."

That thereupon your petitioners appealed from said judgment to the Supreme Court of the State of North Carolina, and that the Supreme Court of the State of North Carolina, at its Fall Term, 1915, to-wit, on the 22nd day of September, 1915, rendered a judgment in said cause reversing the judgment of said Superior Court and granting to your petitioners a new trial; that thereafter the said defendant in error filed a petition in the Supreme Court of North Carolina for a re-hearing of said cause and that said cause was thereafter, to-wit, at February Term, 1916, of the Supreme Court of North Carolina, re-heard upon the petition of the defendant in error, and

3 the said Supreme Court of North Carolina, at said February Term, 1916, to-wit, on the 22nd day of March, 1916, rendered a final judgment in said cause, the Chief Justice and Justice Hoke dissenting, affirming the judgment of said Superior Court of the State of north Carolina, condemning the property of your petitioners, as will appear by reference to the record and proceedings in said cause; that the said Supreme Court of the State of North Carolina is the highest court of said state in which a decision in said suit could be had, and your petitioners claim the right to remove said cause to the Supreme Court of the United States by writ of error under and by virtue of Section 709 of the Revised Statutes of the United States and the other statutes of said United States, because, as your petitioners claim, their defense to the alleged cause of action of the defendant in error which was set up in the answer of the plaintiffs in error filed in said state court shows that the defense of the plaintiffs in error thereto arises under the constitution and laws of the United States, to-wit the Fourteenth Amendment to the Constitution of the United States; and further that the rights and privileges set up and claimed by your petitioners under the statutes of the United States and under the Constitution of the United States and particularly under the Fourteenth Amendment to the Constitution of the United States, were denied by the said Superior Court of the State of North Carolina and by the said Supreme Court of the State of North Carolina, and your petitioners were denied the equal protection of the laws and were deprived of their property without due process of law, contrary to the Constitution of the United States and the Fourteenth Amendment thereof, as appears by the record of the procedings in said cause which is herewith submitted, and that the decision of the said Supreme Court of North Carolina denied to your petitioners the construction of the Constitution of the

4 United States to which it was entitled in said cause, and the errors complained of on this petition are more fully set forth in the assignments of error hereto attached.

Wherefore, your petitioners pray the allowance of a writ of error, returnable to the Supreme Court of the United States within thirty days, as prescribed by the rules of practice in the Supreme Court of

the United States, and for a citation and supersedeas as provided by law; and your petitioners will ever pray, etc.

HENDERSONVILLE LIGHT AND POWER COMPANY,
SALUDA-HENDERSONVILLE INTERURBAN RAILWAY CO.,
(Sgd.) By MICHAEL SCHENCK,
(Sgd.) MARTIN, ROLLINS & WRIGHT,
Counsel for Petitioners.

Let the writ of error issue as prayed for. This the 16th day of May, 1916.

(Signed) WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

A true copy:

[Seal of the Supreme Court of the State of North Carolina.]

J. S. SEAWELL,
Clerk Supreme Court, North Carolina.

5 [Endorsed:] Filed May 16, 1916. In Supreme Court, North Carolina.

6 Supreme Court of the United States, — Term, 1916.

No. —.

HENDERSONVILLE LIGHT AND POWER COMPANY and SALUDA-HENDERSONVILLE INTERURBAN RAILWAY COMPANY, Plaintiffs in Error,

vs.

BLUE RIDGE INTERURBAN RAILWAY COMPANY, Defendant in Error.

Assignment of Errors.

Now comes the above defendants in error and file herewith their petition for a writ of error, and say that there are errors in the record and proceedings of the above entitled case, and for the purpose of having the same reviewed, in the United States Supreme Court, make the following assignment:

The Supreme Court of North Carolina erred in its construction of the Fourteenth Amendment of the Constitution of the United States.

That by this error the Supreme Court of North Carolina decided against the rights set up and claimed by your petitioner upon said Fourteenth Amendment to the Constitution of the United States.

The said errors are more particularly set forth as follows:

7 I.

The Supreme Court of North Carolina erred in holding that property off of the line of a railroad, not needed for the construc-

tion of the railroad, can be taken by a railroad company merely to aid in its operation, in that said holding is in contravention of the "law of the land", and deprives the plaintiffs in error of their property "without due process of law" and in violation of the Fourteenth Amendment of the Constitution of the United States.

II.

The Supreme Court of North Carolina erred in holding that Public property, like that of the plaintiffs in error already devoted to the same public purposes, could be taken by the right of eminent domain, in that said holding denies to the plaintiff in error the equal protection of the laws guaranteed by the Fourteen- Amendment to the Constitution of the United States.

III.

That the Supreme Court of North Carolina erred in holding that the plaintiffs in error were not entitled to submit to a jury their contention that they can develop a water power on the side of the stream owned by them by means of a wing dam, or by means of a flume, or by otherwise diverting and returning the water on their property, or by dividing the water by a dam in the center of the stream, in that said holding deprived the plaintiff in error of the "right of trial by jury", and permitted the defendant in error to take from the plaintiff in error the property of the latter "without due process of law" contrary to the Fourteenth Amendment to the Constitution of the United States.

IV.

The Supreme Court of North Carolina erred in holding that the plaintiffs in error were not entitled to have the jury pass upon the issues A and B, respectively, in words as follows:

"A. Are there water powers, rights and properties on the lands of the respondents as described in the petition, capable of being developed for the production of electric power for use in connection with and in addition to the electric power already developed and in use by the respondent Hendersonville Light and Power Company?"

"B. Are there water powers, rights or properties on the lands of the respondents as described in the petition which are being held by the respondent Hendersonville Light and Power Company, to be used and to be developed for use in connection with or in addition to any power now actually used by the said respondent Hendersonville Light and Power Company?",

in that said holding allowed the defendant in error to take the property of the plaintiffs in error "without due process of law", and without giving the plaintiff in error "equal protection of the laws", and without a "trial by jury", contrary to the Fourteenth Amendment to the Constitution of the United States.

V.

The Supreme Court of North Carolina erred in holding that the property of the plaintiff in error was subject to condemnation at all, for the purpose for which it is sought to be taken by the defendant in error, to wit, in order to make a more economical and comprehensive power development and thus obtain a very large surplus of hydro-electric power for the purposes of a private enterprise to operate mills in the State of South Carolina and elsewhere,
9 it appearing from the record that the defendant in error already has available for development many times the power necessary to operate its alleged interurban railway, which railway, as also appears from the record, is but an incident to the private purposes of the defendant in error, therefore the taking of the property of the plaintiff in error under such circumstances was a violation of its rights and contrary to the Fourteenth Amendment to the constitution of the United States.

VI.

The Supreme Court of North Carolina erred in the above cause for that it appears from the petition of the defendant in error, filed in said cause, (paragraph one), that the defendant in error sought to condemn the property of these petitioners for uses and purposes other than public uses and purposes; that in said petition and in said proceeding the defendant in error in no way set forth what properties it proposed to condemn for public use and what property it proposed to condemn for private use, and that the decision of the Supreme Court of North Carolina permitted the said defendant in error to take the property of the plaintiffs in error for uses other than public uses; that is to say, for private uses, contrary to the Constitution of the United States and in violation thereof. That your petitioners allege that the judgment in this case deprives them of their property without due process of law and denies to them the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

VII.

That it appears that the Supreme Court of North Carolina
10 erred in rendering judgment therein, for that it appeared from the petition in said cause that the only public purpose for which the defendant in error sought to condemn the property of your petitioners was to operate a street and interurban railway from the City of Hendersonville through the towns of Flat Rock, and Saluda, to a point on Green River, at or near the mouth of Big Hungry Creek, in Henderson County, as set forth in paragraphs one and three of the original petition in this cause. And that it appeared upon the trial of said cause, as testified to by the secretary and treasurer and one of the directors of the defendant in error, that one thousand electric horse power was sufficient to

operate the proposed railroad, but that the proposed development for which the property of the plaintiffs in error was to be condemned would enable the defendant in error to develop between thirty thousand and forty thousand electric horse power, from twenty-nine thousand to thirty-nine thousand more horse power than was necessary to operate the alleged prospective railroad of the defendant in error. And the plaintiffs in error allege that the judgment of the Supreme Court of North Carolina was erroneous because it so permitted the defendant in error to take the property of the plaintiffs in error when there was no necessity therefor, and for uses other than public uses, and contrary to the Constitution of United States, and deprived them of their property without due process of law and denied to them the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of United States.

VIII.

For that the Supreme Court of North Carolina erred in
11 holding that the defendant in error had a right to condemn the property of the plaintiffs in error under the facts and circumstances in this case, upon the grounds that it appeared upon the trial of said cause, and plainly appears from the record in said cause that the defendant in error owned other power property, which when developed, taken alone and without the use of any of the property of the plaintiffs in error, would be amply sufficient and more than sufficient to supply all of the public uses claimed by the defendant in error to be necessary to be supplied, and that therefore the said judgment deprives the plaintiffs in error of their property without due process of law, contrary to the Constitution of United States, and especially to the Fourteen- Amendment thereof.

IX.

That the judgment of the Supreme Court of North Carolina in said cause is erroneous, for that it ignored the rights of the plaintiffs in error to be protected in their property by the Constitution of the United States, and ignored the rights of the plaintiffs in error, as claimed and set up in paragraph six of the answer filed in said cause by the plaintiffs in error, contrary to the Constitution of United States and in violation to Fourteenth Amendment to the Constitution of United States, as hereinbefore particularly set forth.

X.

The Supreme Court of North Carolina erred in holding that the plaintiffs in error were not entitled to have investigated the contention made that the defendant in error is such a combination as is injurious to the public welfare and contrary to the law of the land, in that said holding denied to the plain- in error the pro-
12 tection of their rights guaranteed by the Fourteenth Amendment of the Constitution of the United States and the Acts of

Congress regulating and governing combinations of trade, monopolies and trusts, and allowed the plaintiffs in error to be deprived of their property without due process of law, and denied to the plaintiffs in error equal protection of the laws.

XI.

That the Supreme Court of North Carolina erred in refusing to sustain Exception No. 2 and Assignment of Error No. 2 of the plaintiffs in error, to the refusal of the Court below to grant their motion for judgment as of non-suit, at the close of the evidence, for the reason that it appears from the record in said cause and from the findings of fact by the Judge therein, that the defendant in error sought to condemn and was permitted to condemn the property of the plaintiffs in error for a use not a public use and when there was no necessity therefor, in contravention of the Constitution of the United States and especially the Fourteenth Amendment thereof, and that the plaintiffs in error were thus deprived of their property without due process of law and were denied the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of United States.

XII.

That the Supreme Court of North Carolina erred in refusing to sustain Exception No. 2 and Assignment No. 2 of the plaintiff in error, to the refusal of the Court below to grant their motion for judgment as of non-suit, at the close of the evidence, for the
13 reason that it appeared from the record in said cause that the defendant in error sought to condemn the property of the plaintiffs in error for an alleged public purpose, to wit, the operation of a street railway and for the purpose of generating electricity to be used wherever needed, and desired, and for the purpose of constructing, equipping and maintaining, buildings, works, factories and plants, and to install, maintain and operate all kinds of machinery and appliances, to operate the same by hand, steam, water, electric or other motive power and for performing all acts which may be deemed necessary by said defendant in error for the prosecution of the objects and purposes for which it was incorporated, contrary to the rights of the plaintiffs in error as guaranteed to them by the Constitution of the United States, and especially the Fourteenth Amendment thereof, and by reason of which the plaintiffs in error are deprived of their property without due process of law, and are denied the equal protection of the laws in contravention to the Constitution of the United States.

For which errors, the plaintiffs in error, Hendersonville Light and Power Company and Saluda-Hendersonville Interurban Railway Company, pray that the judgment of the Supreme Court of North

Carolina, dated March 22, 1916, be reversed, and a judgment rendered in favor of the plaintiffs in error, and for the costs.

(Signed) MICHAEL SCHENCK,
(Signed) MARTIN, ROLLINS & WRIGHT,
Counsel for Plaintiffs in Error.

A true copy:
J. J. SEAWELL,
Clerk Supreme Court, North Carolina.

14 [Endorsed:] Filed May 16, 1916. In Supreme Court, North Carolina.

15 UNITED STATES OF AMERICA:

Writ of Error.

The President of the United States of America, to the Honorable the Judges of the Supreme Court of the State of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in said suit between the Blue Ridge Interurban Railway Company, plaintiff, and Hendersonville Light and Power Company and Saluda-Hendersonville Interurban Railway Company defendants, wherein was drawn in question the validity of a treaty or statute, of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State of North Carolina, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the constitution or treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said constitution, treaty, statute or commission; a manifest error hath happened to the great damage of the said defendants, Hendersonville Light and Power Company and the Saluda-Hendersonville Interurban Railway Company, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein
16 given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said

Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, on the 16th day of May, in the year of our Lord one thousand nine hundred and sixteen.

(Signed) ALEX P. BLOW,
Clerk of the District Court of the United States for the Eastern District of North Carolina.

[Seal United States District Court, Eastern District of N. C.]

The foregoing writ of error is hereby allowed.
This the 16th day of May, 1916.

(Signed) WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

A true Copy:
J. S. SEAWELL,
Clerk Supreme Court North Carolina.

[Seal of the Supreme Court of the State of North Carolina.]

17 [Endorsed:] Filed May 16, 1916. In Supreme Court, North Carolina.

18 UNITED STATES OF AMERICA:

Citation.

To Blue Ridge Interurban Railway Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of North Carolina, wherein Hendersonville Light and Power Company and Saluda-Hendersonville Interurban Railway Company are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in this behalf.

Witness, the Honorable Walter Clark, Chief Justice of the Supreme Court of North Carolina, this the 16th day of May, one thousand nine hundred and sixteen.

WALTER CLARK,
Chief Justice.

Attest:
J. L. SEAWELL,
Clerk Supreme Court of North Carolina.

May 16, 1916.

[Seal of the Supreme Court of the State of North Carolina.]

We, attorneys of record for the defendant in error in the above entitled cause, hereby acknowledge service of the above citation, by the receipt of a copy thereof, and waive any further service thereof.

This, the 20th day of May, A. D., 1916.

SMITH & SHIPMAN,
Attorneys for Defendant in Error, Blue Ridge Interurban Railway Company.

19 [Endorsed:] Hendersonville Light and Power Company and Saluda-Hendersonville Interurban Railway Company, vs. Blue Ridge Interurban Railway Company. Citation. Martin, Rollins & Wright, Attorneys and Counsellors at Law, Asheville, N. C. Filed May 16, 1916. In Supreme Court, North Carolina.

20 In the Supreme Court of North Carolina.

BLUE RIDGE INTERURBAN RAILWAY COMPANY
vs.
HENDERSONVILLE LIGHT AND POWER COMPANY and SALUDA-HENDERSONVILLE INTERURBAN RAILWAY COMPANY.

Supersedeas and Cost Bond.

Know All Men by These Presents, that we, Hendersonville Light and Power Company and Saluda-Hendersonville Interurban Railway Company, corporations organized under the laws of the State of North Carolina, as principal, and National Surety Company, a corporation organized under the laws of New York, as surety, are held and firmly bound unto the Blue Ridge Interurban Railway Company, a corporation organized under the laws of the State of North Carolina, in the full sum of One Thousand ($1,000.) Dollars, for the payment of which sum well and truly to be made we hereby, jointly and severally, bind ourselves, our successors and assigns, firmly by these presents.

Sealed with our seals and dated this the 13th day of May, one thousand nine hundred and sixteen.

Whereas, lately at a hearing had before the Supreme Court of North Carolina, in a suit pending in said court between said Blue Ridge Interurban Railway Company, as plaintiff, and the said Hendersonville Light and Power Company and Saluda-Hendersonville Interurban Railway Company, as defendants, a final judgment was rendered against the said Hendersonville Light and Power Company and Saluda-Hendersonville Interurban Railway Company, and the said Hendersonville Light and Power Company and Saluda-

21 Hendersonville Interurban Railway Company seek to prosecute a writ of error to the Supreme Court of the United States to reverse the said judgment;

Now, Therefore, the condition of this obligation is such that if the said Hendersonville Light and Power Company and Saluda-Hendersonville Interurban Railway Company, as plaintiff in error,

shall prosecute their writ of error and answer all costs and damages that may be adjudged against them, if they shall fail to make good their plea, then this obligation shall be void; otherwise, to remain in full force and effect.

In Witness Whereof, the said principals and surety have hereunto caused their names to be subscribed, this the 13th day of May, 1916.

HENDERSONVILLE LIGHT AND POWER COMPANY, [SEAL.]
(Signed) MICHAEL SCHENCK AND
(Signed) By MARTIN, ROLLINS & WRIGHT,
Attorneys.

SALUDA-HENDERSONVILLE INTERURBAN RAILWAY CO. [SEAL.]
(Signed) MICHAEL SCHENCK AND
(Signed) By MARTIN, ROLLINS & WRIGHT,
Attorneys.

NATIONAL SURETY COMPANY,
(Signed) By W. MARSHALL BRIDGES,
Agent.

[Seal National Surety Company, New York—Incorporated, 1897.]

A copy:

Attest:

J. L. SEAWELL,
Clerk Supreme Court, North Carolina.

[Seal of the Supreme Court of the State of North Carolina.]

The foregoing bond having been examined, the same is hereby approved, and it is ordered that the same shall operate as a supersedeas in the above entitled cause.

This the 16th day of May, 1916.

(Signed) WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

22 [Endorsed:] Filed May 16, 1916. In Supreme Court, North Carolina.

23 No.—

BLUE RIDGE INTERURBAN RAILWAY CO.
against
LIGHT AND POWER CO. and INTERURBAN RAILWAY COMPANY.

From Henderson.

Before Webb, Judge.

Appeal by Defendants, Light and Power Company and Interurban Railway Company.

STATE OF NORTH CAROLINA,
Henderson County:

In the Superior Court, November Term, 1914.

Be it known that at the November term, 1914, of the Superior Court of Henderson county, the following proceedings were had, to wit:

Summons.

HENDERSON COUNTY:

In the Superior Court.

Before the Clerk.

BLUE RIDGE INTERURBAN RAILWAY CO.
VS.
HENDERSONVILLE LIGHT AND POWER CO. and SALUDA-HENDERSONVILLE INTERURBAN RAILWAY CO.

State of North Carolina to the Sheriff of Henderson County, Greeting:

You are hereby commanded to summon Hendersonville Light & Power Co., and Saluda-Hendersonville Interurban Railway Co., the defendants above named, (if they be found within our County,) to be and appear at the office of the Clerk of the Superior Court of Henderson County, on the 23rd day of June, 1913 and answer the Petition of Plaintiffs, which is on file in said office, and let them take notice that if they fail to answer the said petition at that
24 time, the plaintiff will apply to the Court for the relief demanded in the petition.

Hereof fail not, and of this summons make due return.

Given under my hand and seal of said Court this the 7th day of June, A. D. 1913.

C. M. PACE,
Clerk Superior Court Henderson County.

This summons contains the following endorsement:

Received June 7, 1913; served June 7, 1913, on Saluda-Hendersonville Interurban Railway Co., by reading within summons and leaving a copy of same and copy of petition filed in cause to J. M. Torrence, Secretary and Treasurer of said defendant. Served June 9th, 1913 on Hendersonville Light & Power Co., by reading within summons to R. M. Oates, President of said defendant and by delivering to him a copy of the same and a copy of the petition filed in the cause.

J. C. DRAKE,
Sheriff of Henderson County.

Undertaking.

STATE OF NORTH CAROLINA,
County of Henderson:

In the Superior Court.

Before the Clerk.

BLUE RIDGE INTERURBAN RAILWAY COMPANY
vs.
HENDERSONVILLE LIGHT AND POWER COMPANY and SALUDA-HENDERSONVILLE INTERURBAN RAILWAY CO.

Know all men by these presents that we Blue Ridge Interurban Railway Co., as principal, and American Bonding Co., as surety, acknowledge ourselves indebted to the defendants in the above cause in the sum of $200.00, to be void if the plaintiff shall pay to the defendant all such costs as they may recover of the plaintiff in said action.

This 7th day of June, 1913.

BLUE RIDGE INTERURBAN RAILWAY CO.
By SMITH & SHIPMAN, *Attorneys.*
AMERICAN BONDING CO.,
By P. F. PATTON, *Agent.*

25 *Petition.*

STATE OF NORTH CAROLINA,
County of Henderson:

In the Superior Court.

Before the Clerk.

BLUE RIDGE INTERURBAN RAILWAY COMPANY
VS.
HENDERSONVILLE LIGHT & POWER COMPANY and SALUDA-HENDERSONVILLE INTERURBAN RAILWAY COMPANY.

To the Superior Court of Henderson County:

The petition of the Blue Ridge Interurban Railway Company, the petitioner above named, respectfully showeth:

1. That the said petitioner is a corporation duly chartered and organized under the laws of the State of North Carolina, with its principal office at Saluda, North Carolina, and has the power under it charter;

(*a*) To build, own, maintain and operate a street and interurban railway from the city of Hendersonville through the towns of Flat Rock and Saluda to a point on Green River at or near the mouth of Big Hungry Creek in Henderson County, together with the power to build and extend its railway lines to any other point or points not exceeding fifty miles from the town of Saluda;

(*b*) To erect and maintain a water power plant on Green River between Big Hungry Creek and Henderson Island for the purpose of generating electricity to be used in operating said railway;

(*c*) To have all other powers granted by the laws of North Carolina to corporations of this character, including all rights of condemnation and the right to sell and dispose of the surplus electric power generated at its power plant and the right and power to erect and maintain poles and tower lines, wires and all other structures, fixtures and appliances necessary to convey its power wherever needed and desired.

(*d*) To construct, equip and maintain buildings, works, factories and plants; to install, maintain and operate all kinds of machinery and appliances; to operate same by hand, steam, water, electric or other motive power, and generally to perform all acts which
26 may be deemed necessary or expedient for the proper and successful prosecution of the objects and purposes for which the corporation is created.

2. That it is the intention of said petitioner in good faith to conduct and carry on the public business authorized by its charter, as set forth in paragraph one of this petition, and as evidence of its intention and good faith; the said petitioner avers that it has purchased lands and water powers on Green River and its tributaries in Henderson and Polk counties at a cost of more than $200,000.00;

that it has at much cost and expense employed the services of the most skilled and competent, hydraulic, electrical and railroad engineers, who have made the most definite and accurate surveys, calculations and estimations necessary to the development of said water powers, and that it has made the necessary financial arrangements for the said development, which, when completed, will produce approximately fifty thousand horse power.

3. That it is the purpose and intention of the petitioner in good faith to build, construct, equip and operate a street and interurban railway from the city of Hendersonville through the towns of Flat Rock and Saluda to a point on Green River at or near the mouth of Big Hungry Creek in Henderson County, as authorized by its charter and as set forth in subsection "a" of paragraph one of this petition which said railway is to carry on the business of a common carrier and public service corporation.

4. That in order to operate said railroad it is necessary for the petitioner to generate electric power by developing same on Green River; and in order to fully develop said power according to the plans of its said engineers, it is neccessary to construct a dam about one hundred and fifty feet in height, on the petitioner's property, across Green River just below the mouth of Big Hungry Creek, and to convey the water from said dam through a flume to be constructed over the petitioner's land, which lies on the south side of said river, to its power plant in Green River Cove, which said plant is to be constructed on the petitioner's land on what is known as the
27 Weaver and Henderson tract about three miles below said dam.

5. That the said defendants, are the owners or claim to be the owners, of the following described tract of land lying in the counties of Henderson and Polk and bounded as follows:

Beginning at a stake on the North bank of Green River at the mouth of Pullam's Creek and runs up said creek North 45 deg. East 20 poles to a stake; thence up said creek and with it East 16 poles to a stake; thence up and with it North 63 deg. East 60 poles to a stake and Spruce Pine at the mouth of English Heifer cove branch, thence up and with said branch North 73 deg. East 26 poles to a stake; thence North 67 deg. West 152 poles to a rock and pointers in D. L. Morrison's line; thence with his line South 50 deg. West 98 poles to a stake in Green River; thence down the river and with it to the beginning, containing 76 acres more or less, which said tract of land is between the points designated for the construction of said dam and the erection of said power plant, and lies on the north side of and calls for Green River, but does not cross the same, and extends along the same for a distance of about 160 poles, as shown by plat hereto attached, and as described in deed from D. L. Morrison to J. M. Torrence, of record in Henderson Co., in Book 59 at page 254.

6. That as the plaintiff is informed, believes and avers the said Saluda-Hendersonville Interurban Railway Company is the sole equitable and beneficial owner of said lands, and that the said Hendersonville Light & Power Company owns no interest in said

lands other than the naked legal title; that the deed to the said Light & Power Company from the said Railway Company was not executed in good faith to pass the title, but was done solely for the purpose of enabling the said Railway Company to obtain certain legal rights under the law, which they could not otherwise set up.

7. That the defendant, Hendersonville Light & Power Company is a corporation, organized under the laws of the State of
28 North Carolina with its principal office at Hendersonville, North Carolina, and that the said Saluda-Hendersonville Interurban Railway Company is a corporation duly organized under the laws of said State, with its principal office at Kings Mountain, North Carolina.

8. That that portion of the water of said river that flows over lands of the said defendant is of little, if any, value to said lands for the reason that the said defendants cannot, with their said lands, make it useful as a water power.

9. That the said petitioner in order to make the developments hereinbefore mentioned will have to obstruct said river and divert the water therefrom above the lands of the said defendants by means of its dam and flume; which said developments cannot be made without the obstruction and diversion of said water.

10. That the said petitioner has, after a reasonable effort, been unable to agree with the said defendant for the purchase of the right to make the obstruction and diversion of said river and has offered them an amount far in excess of the value of said right, which offer has been refused.

Wherefore your petitioner prays that a summons issue to the defendants to appear before the Clerk of the Superior Court of Henderson County, and show cause, if any he has, why three disinterested and competent freeholders, who reside in said county, should not be appointed, who shall visit the lands and condemn the water rights, easements and privileges of the said defendants in Green River as incident to their said lands by the obstruction and diversion of the water of said river as set out in the petition.

(Signed) SMITH & SHIPMAN,
Attorneys for Petitioner.

Geo. E. Ladshaw being duly sworn says:

That he is a director of the Blue Ridge Interurban Railway Company, the petitioner in the foregoing petition, that he has read the said petition and knows the contents thereof, that the same is true to his knowledge except as to matters therein stated
29 information and belief and as to those matters he believes it to be true.

(Signed) GEO. E. LADSHAW, *Affiant.*

Sworn to and subscribed before me this the 7th day of June, 1913.

C. M. PACE,
Clerk Superior Court.

Answer.

STATE OF NORTH CAROLINA,
County of Henderson:

In the Superior Court.

Before the Clerk.

BLUE RIDGE INTERURBAN RAILWAY COMPANY
vs.
HENDERSONVILLE LIGHT & POWER COMPANY and SALUDA-HENDERSONVILLE INTERURBAN RAILWAY COMPANY.

The respondents, Hendersonville Light & Power Company and Saluda-Hendersonville Interurban Railway Company, answering jointly, the petition of the petitioner, Blue Ridge Interurban Railway Company, say:

1. That the allegations contained in paragraph one of said petition are, as said respondents are advised, informed and believe, untrue, and the same are, therefore, denied. And said respondents aver, in this connection, as they are advised, informed and believe, that such a corporation as the petitioner claims to be cannot be created under the provisions of Sections 1137, 1138, 1139 and 1140 of the Revisal of 1905, or any amendments thereto. And said respondents, in this connection, specifically deny, upon advice, information and belief, that the said petitioner is a Street Railway Company.

2. That the allegations contained in paragraph two of said petition are, as respondents are advised, informed and believe, untrue, and the same are, therefore, denied.

3. That the allegations contained in paragraph three of said petition are, as said respondents are advised, informed and believe, untrue, and the same are, therefore denied. And said respondents aver, in this connection, that the character of the land over which said petitioner claims it is its intention to build and operate a line of street railway, is hilly and mountainous, and the section of the country through which said railway would run, if built, is sparsely settled and of practically no value for farming purposes, and is without any manufacturing enterprises, mining industries, or other things whatsoever to produce freight or passenger traffic for the support of a railroad of the character of that described in said petition. And said respondents further aver, in this connection, that the section of country through which said petitioner claims it is its intention to build said line of street railroad, is traversed by one of the main lines of the Southern Railway Company's system, which the line of a street railway, or any other sort of railroad constructed in the manner set forth in said petition, would practically parallel. And said respondents further aver, in this connection, upon information and belief, that the whole scheme

of those persons who have attempted to incorporate themselves as Blue Ridge Interurban Railway Company, was not at the time of the alleged incorporation of said alleged railway company, and is not now, for the purpose of constructing and operating a railroad, in good faith, but it was, and, is the purpose of said persons, in attempting to so incorporate themselves, to obtain the power of eminent domain, whereby they might, by condemnation proceedings, procure, or attempt to procure, the lands, water powers, water rights and franchises of said respondents, in order to enable said persons to manufacture or generate electric power to transmit and sell to manufacturing and other private enterprises in which they are interested, in the State of South Carolina, and elsewhere.

4. That the allegations contained in paragraph four of said petition are untrue, and the same are, therefore, denied. And the respondents aver, in this connection, that the said petitioner can develop on its own lands, without interfering in any way with the rights and property of said respondents, either at a point above or below the lands described in said petition, sufficient water
31 power to manufacture more than twenty times the amount of electric power it would require to operate the line of street or interurban railroad described in said petition, and that, therefore, there is no necessity whatever for the condemnation of the lands or property described in the petition, or any part thereof, or any easement or right in or over same, for the use and benefit of said petitioner for the purpose alleged in the petition.

5. The respondents, answering paragraph five of said petition, say that said Hendersonville Light & Power Company is the owner of the lands described in said paragraph of said petition, and that Saluda-Hendersonville Interurban Railway Company holds a deed in trust on said land, which deed in trust is recorded in the office of the Register of Deeds for Henderson County in Book No. 34 at page 438 et seq., of the records for such instruments. All the other allegations contained in said paragraph of said petition are, as these respondents are advised, informed and believe, untrue, and same are, therefore, denied, except that it is admitted that the major portion of said land lies on the North side of Green River and is as described in the deed referred to in said paragraph five of said petition.

6. That the allegations contained in paragraph six of said petition are untrue, and the same are, therefore, denied.

7th. That the allegations contained in paragraph seven of said petition are true.

8. That the allegations contained in paragraph eight of said petition are untrue, and the same are, therefore, denied. And said respondents aver, in this connection, that they can, as they are advised, informed and believe, use that portion of the water of said river, which flows over the lands described in paragraph five of said petition, so as to develop same on said land, into a water power which will produce approximately 1300 horse power for the full period of twenty-four hours each day.

9. That the allegations contained in paragraph nine of said

petition are, as said respondents are informed and believe, untrue, and the same, therefore, are denied.

32½ 10. That the allegations contained in paragraph ten of said petition are untrue, and the same are, therefore, denied.

And for a further answer and defense to said petition, the said respondents say:

1st. That in the fall of 1902 R. M. Oates, who is now President of and principal stockholder in said Hendersonville Light & Power Company, investigated the matter of supplying the town of Hendersonville and the surrounding community with electric light and power, and that, after making a careful and thorough investigation, with the aid of competent engineers, he entered into a contract with said town to install and maintain and operate an electric plant for the purpose of supplying the citizens of said town and the surrounding community with electric lights and power. That after said Oates had entered into said contract with said town, he installed an electric plant and commenced to operate same in April 1903, and after operating said plant through the year 1903 with steam, he found the operation of said plant with steam to be impractical; whereupon the said Hendersonville Light & Power Company was incorporated and water falls on some of the streams of Henderson County, suitable for development into water powers, were investigated by said Oates, who was, at the time, the largest stockholder in said Light & Power Company, with a view to their purchase and development, from time to time, as needed by said Light & Power Company. That said Light & Power Company did purchase and develop, in the spring of 1904, what it calls its No. 1 water power on Big Hungry Creek. That the growth of the business of said Light & Power Company, and the demands made upon it for light and power, soon demonstrated that it would be necessary for said Light & Power Company to procure additional power in order to enable it to meet the increasing demands made upon it for light and power, and in the exercise of ordinary foresight and prudence said respondent, Hendersonville Light & Power Company arranged in the year 1906 for the purchase of the G. W. Jones mill shoal on Big Hungry Creek, which said shoal, the Hendersonville

32 Light & Power Company calls its No. 2 water power. And further, that in the year 1909 said Hendersonville Light & Power Company bought what it calls its No. 3 water power, on and near the mouth of said creek; and in the year 1913 it bought from the Saluda-Hendersonville Interurban Railway Company the tract of land described in paragraph five of said petition, together with the water rights and water powers thereon, and the privileges and appurtenances thereto belonging, which tract of land is on Green River at what is called "The Narrows," and upon said tract, as hereinbefore alleged, there are water falls capable of being developed into water powers, which will produce approximately 1300 H. P. for the full period of twenty-four hours each day.

2. That said tract of land upon which are situated what the said Hendersonville Light & Power Company calls its No. 2 water power and its No. 3 water power, and the tract of land described in para-

graph five of said petition, together with the water falls, water rights, and other privileges and appurtenances thereto belonging, were all purchased with the view to ultimately developing and utilizing the same through electrical transmission, for the purpose aforesaid. That said water powers and water falls are conveniently located to the town of Hendersonville, to whose citizens said respondent, the Hendersonville Light & Power Company, is as herein before alleged, now furnishing light, and to whose manufacturing enterprises said company is furnishing electric power. And said respondents further aver that said water falls and water powers are also conveniently located to the town of Saluda and East Flat Rock, and other communities whose people said Hendersonville Light & Power Company proposes to furnish with light and power at no late date.

3. That the operation, by said respondent, the Hendersonville Light & Power Company, of its present plant, for the past nine years, has proven conclusively, the wisdom and necessity for its purchase and development of said water powers, as the operation of said respondent's plant by steam, for a period of five months after its power house at its No. 1 Water Power was swept away by
33 flood, on August 31st, 1910, showed a net loss to said respondent of three hundred dollars per month. That the development of the present water power and the erection of the present power house of said respondent, the Hendersonville Light & Power Company, was completed in February 1911, and the year 1912, which was the most prosperous in the history of said light and power company, showed earnings of five and a fraction per centum on the amount of money invested in said enterprise. That it has taken close application and arduous work on the part of the officers and stockholders in said Hendersonville Light & Power Company to develop and establish its present business, and in order that the demands of the public for service, may be met, it is necessary that additional power be developed as soon as possible, and it is the intention of the said Hendersonville Light & Power Company to develop, in connection with, or in addition to its present water power, more of its additional water powers and water falls just as soon as the proceedings to condemn its No. 2 water power and its No. 3 water power and the proceeding to condemn and destroy its water power and water rights on and appurtenant to the lands described in paragraph five of the petition herein, are terminated.

4. That said petitioner, as said respondents are advised, informed and believe, and so aver, has no right or power to institute special proceedings to condemn the lands described in paragraph five of said petition, which lands are owned and held by said respondent, the Hendersonville Light & Power Company, for that said lands are expressly exempted from the right of said petitioner, or any corporation, to exercise the power of eminent domain for any purpose whatsoever, for the following reason; because (*a*) on the lands described in said petition are situated certain waters and water falls capable of being developed into water powers, which will produce many hundreds of horse power, as hereinbefore alleged; and because (*b*) the respondent, the Hendersonville Light & Power Com-

pany, is now, and has been for the past nine years, a corporation engaged in the actual service of the general public, and on
34 the lands described in said petition are situated certain water powers, rights and property, owned and held to be used, or to be developed by said Henderson Light & Power Company for use in connection with or in addition to the power now actually used by said Hendersonville Light & Power Company in serving the general public.

5. That, as the respondents are advised, informed and believe, and so aver, the Superior Court of Henderson County has not now, and has never had any jurisdiction to make any order to condemn the lands described in the petition in this cause; and if said Court ever had such jurisdiction it has been expressly withdrawn by an act of the legislature passed and ratified at its session of 1913, entitled "An act to amend chapter three hundred and two, public laws of one thousand and nine hundred and seven, relating to the right of eminent domain."

6. That, upon advice, information and belief, said respondents aver, the condemnation of the lands described in the fifth paragraph of said petition, in the manner and for the purpose alleged in said petition, would be the taking of private property without due process of law, and in violation of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, the respondents demand judgment that the said petition be dismissed, and that the petitioner take nothing thereunder or thereby, and that the respondents go hence without day and recover their costs in this behalf incurred.

J. H. MERRIMON,
STATON & RECTOR,
MICHAEL SCHENCK,
Attorneys for the Respondents, Hendersonville Light, & Power Company and Saluda-Hendersonville Interurban Railway Company.

R. M. Oates, being duly sworn, says:

That he is the president of the Hendersonville Light &
35 Power Company, one of the respondents in the foregoing answer; that he has read the said answer and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

R. M. OATES.

Sworn to and subscribed before me, this, the 23rd day of June, A. D. 1913.

[SEAL.] JNO. W. GRIMES,
Notary Public.

The following questions of fact are adopted by the Court to be answered by the Court upon the evidence:

1. Is it the intention of the Blue Ridge Interurban Railway Co., the petitioners, in good faith to conduct and carry on the public business authorized by its charter as set forth in paragraph One of its petition.

Answer. Yes.

2. Does the petitioner, the Interurban Railway Co., own lands on Green River, on one or both sides, and its tributaries, in Henderson and Polk Counties, which can be used for the development of a water power:

Answer. Yes.

3. Is it the purpose and intention of the petitioner in good faith to build, construct, equip and operate a street and interurban railway from the Town of Hendersonville, through Flat Rock and Saluda, to a point on Green River at or near the mouth of Big Hungry Creek in Henderson County as alleged in paragraph Three of the petition?

Answer. Yes.

4. Is it necessary for the petitioner to generate electric power by developing same on Green River to operate said alleged railway?

Answer. Yes.

5. Did petitioner, prior to the commencement of this proceeding, make a reasonable effort to agree with the respondent for the purchase of the right to divert the water from the lands of the respondents, as set forth in the petition?

Answer. Yes.

36 6. Was, the petitioner's special proceeding for the condemnation of the property rights of the respondents as described in the petition for a public use?

Answer. Yes.

7. Is it necessary in order to fully develop petitioner's alleged water power on Green River for the purposes alleged in its petition to condemn the rights described in the petition?

Answer. Yes.

8. Is the respondent, the Hendersonville Light & Power Co., a corporation now engaged in the actual service of the general public?

Answer. Yes.

The Court submits to the jury the following issues:

A. Are there water powers, rights and properties on the lands of the respondents as described in the petition capable of being developed for the production of electric power for use in connection with and in addition to the electric power already developed and in use by the respondent, Hendersonville Light & Power Co?

Answer. No.

B. Are there water powers, rights or properties on the lands of the respondents as described in the petition which are being held by the respondent, Hendersonville Light & Power Co., to be used or to be developed for use in connection with or in addition to any power now actually used by the said respondent, Hendersonville Light & Power Co.?

Answer. No.

C. What compensation are defendants, or either of them, entitled to recover for the acquirement by condemnation by the petitioners

of the right to divert the water in the manner set forth in the petition?

Answer. Ten Thousand Dollars ($10,000.00).

37 *Respondents' Case on Appeal.*

STATE OF NORTH CAROLINA,
County — Henderson:

In Superior Court, November Term, 1914.

BLUE RIDGE INTERURBAN RAILWAY COMPANY
vs.
HENDERSONVILLE LIGHT AND POWER COMPANY and SALUDA-HENDERSONVILLE INTERURBAN RAILWAY COMPANY.

This was a Special Proceeding brought before the Clerk of the Superior Court of Henderson County to acquire by condemnation the right to divert the waters of Green River from the lands of the respondents in Henderson County, and transferred to the Civil Issue Docket of said county for trial. The proceeding was tried before His Honor, James L. Webb, Judge, and a jury at the November Term, 1914, of the said Superior Court. From the judgment rendered in said proceeding at said term of court the respondents appealed.

The petitioner introduced evidence as follows, to wit:

Evidence.

STATE OF NORTH CAROLINA,
County of Henderson:

In Superior Court, November Term, 1914.

BLUE RIDGE INTERURBAN RAILWAY CO.
vs.
HENDERSONVILLE LIGHT & POWER CO., and SALUDA HENDERSONVILLE INTERURBAN RAILWAY COMPANY.

This case coming on to be heard at the November Term, 1914 of Superior Court for Henderson County, before His Honor, J. L. Webb, Judge, and a jury, the petitioners being represented by Messrs. H. L. Bomar, C. W. Tillett, and Smith & Shipman, the respondents being represented by Messrs. J. J. Britt Michael Schenck and Staton & Rector, the following evidence was offered by the parties:

The attorneys for the petitioner offer in evidence the summons, petition, answer, judgment, questions of fact and issues of fact in the case of Blue Ridge Interurban Railway Company vs. R. M. Oates

and Hendersonville Light & Power Co., upon all the ques-
38 tions determined in that case which are involved in this case.

This evidence is offered against the Hendersonville Light & Power Co., alone.

Objected by defendant respondents.

It is admitted by both parties that for the purpose of this proceeding, the petitioner has title to the lands and water rights as set forth in its petition and that the defendants have title to the lands and water rights described and referred to in the answer of the defendants.

Plaintiffs introduce in evidence certificate of incorporation of the plaintiff company marked

EXHIBIT ONE.

JOHN A. LAW, being duly sworn testifies:

Resides in Spartanburg, S. C., was present at the trial of the Blue Ridge Interurban Railway Company vs. Hendersonville Light & Power Co., and R. M. Oates, who are the same parties in this suit. This was the same development referred to. Am secretary and treasurer of the Blue Ridge Interurban Railway Company, and custodian of the records; have minutes and resolutions adopted with reference to this development as follows:

February 13, 1913.

"That it is the sense of the stockholders of the company that immediate steps be taken looking to the construction of a dam, power house and other necessary appurtenances for creating of hydro-electric power on Green River between a point at or near Big Hungry Creek and Henderson's Island, and that we proceed to get the necessary easements for that purpose, and also for the purpose of constructing a railroad beginning at or near the dam site and running thence to the Southern Railway at or near Saluda.

"That in the event such easements can not be acquired by purchase that steps be taken immediately to obtain the same by condemnation proceedings.

39 "That such development be made in accordance with the plans and specifications of Sellers & Rippey, engineers, of Philadelphia, Pa."

Pursuant to those resolutions we employed those engineers and they have submitted preliminary plans; they had submitted them prior to that time. It is the purpose of our company in good faith to build an interurban railway from Saluda by the dam and Flat Rock to Hendersonville, connecting those points. We have had an engineering corps in the field put them there immediately after passing that resolution. They have run over the greater portion of the line from Saluda to the dam and up to Flat Rock on the other side. If our plans are carried out, we will have a hydro-electric development at the proposed dam, with a lake of something over 200 acres, I am informed. The railway feature of the development has been in contemplation since the early history of the organization, 1906 or

1907. We had preliminary plans as far back as that for the railway. We had no definite plans, had projective plans, were to connect with the Seaboard railroad at Rutherfordton. Turner Shoals is on our development; that is two-thirds of the way to Rutherfordton, some nine miles from there, which I understand is the nearest point of the Seaboard from Hendersonville. The electricity is to be used in supplying public utilities in this section, operating cotton mills and operating this railroad. We expected to run wires to Saluda and Hendersonville. I should say something in the neighborhood of $2,000,000.00 would be required for this development. We have made tentative arrangements to get this money through my brother, W. A. Law, vice president of the First National Bank of Philadelphia, and President of the American National Bankers Association, elected something like a month ago.

Cross-examination:

Am secretary and treasurer of the Blue Ridge Company. The first meeting of our stockholders was held at Spartanburg, S. C. Our charter does not provide that the principal office shall be at
40 Spartanburg, but says it shall be at Saluda. Our Company has not maintained a regular office at Saluda, if you mean renting an office. Have never made an attempt to open or maintain an office at Saluda. Spartanburg is where the officers of the company reside and where the books of the company are kept. There have been frequent visits made by the company to Saluda. The Manufacturers Power Co. was organized in South Carolina, domesticated in North Carolina. The holdings they transferred to the Blue Ridge Interurban Railway Co., were paid for by stock in the Blue Ridge Co. No money was paid. $500,000 in stock, 5,000 shares less 71, 4929 shares were paid. The Manufacturers Power Co., paid something over $200,000 for its Henderson and Polk County properties, paid in stock of the company to the individuals who paid for the land. They paid $700,000 in stock to the seven stockholders, six of whom were in Spartanburg, one in Philadelphia. There have been payments on the land involved in this development within the last few months. The transactions have been comparatively small, I think the last one we paid was $400. I can not remember exactly what tract that was without refreshing my memory. I think that was to J. A. Taylor, I am not familiar with just what the land is or where. It is not a fact that the amount of actual cash paid on any and all land included in the proposed development is less than $150,000. All these purchases have been made with actual cash by these stock holders. The Manufacturers Power Co., issued stock for these lands. My recollection is that something over $200,000 in cash has been paid to the vendors of these lands. I would have to get the books of the company to tell to whom these amounts had been paid. My recollection is that it is slightly in excess of $200,000. We issued $500,000 for the part of it that was transferred to the Blue Ridge Interurban Company. That is not for all the land. The original company organized was the Green River Power Company.

A charter was never issued, my recollection is that a commission was obtained in South Carolina, then we found there was a company in North Carolina by that name; previous to that, there had been
41 a company chartered by Mr. White and Mr. Ladshaw called the Appalachian Power Company. When these two companies merged we took out the charter for the Manufacturers Power Co. and then for the Blue Ridge Interurban Railway Company. We have tentative arrangements made for the amount of money necessary for this development, two million dollars. I mean my brother took an interest in this company with us with the statement that he would arrange for the development money for us. That was back some time prior to the organization of the Manufacturers Power Co., about three years ago. He has recently assured us of his ability to do that and is expecting to do that. He has never offered us a tentative draft for we have never been able to have a definite plan for development. He is in close touch with the bond companies and has arrangements with them. He has never delivered to us a written contract for the necessary money to make this development. I am a banker, cotton mill manufacturer and a director in one railroad, the Piedmont and Northern. The same interests own controlling stock in that and the Southern Power Company. Never heard this railroad called the Southern Power Company, road, have heard it called the Duke road. I think he is the president. I have an idea of the present financial condition of the country. I think it would be an exceedingly difficult task under present circumstances for my brother to raise $2,000,000, at the moment, if we had definite arrangements not only with him but with the bond people to put up money for that development. I would feel hesitation in asking them. The payments represented by the issue of stock by the present company and its predecessors will be approximately five or six times the amounts of money actually paid for the land included in the development. I think it is entirely right and proper for a group of proper ties that have been brought together to be capitalized at a higher price than those individual properties for they are worth very much more than before they were brought together. My recollection is the development at Hungry Creek would be
42 between 30,000 and 40,000 H. P. I do not know the amount required for the operation of the railroad. I remember the question was asked me before and I said from the general information I had I thought it would not take more than 1,000 H. P. We would have 29,000 or 39,000 H. P. surplus if the railroad never grew any larger. We propose to use some of that power for running cotton mills in South Carolina and some in North Carolina. We have four properties, Turners Shoals, Fosters Shoals, Hungry Creek and Potts Shoals, those were covered principally under the preliminary report. Our present plan is not a consolidated one, that development would not cover the Turner and Foster properties. They are further down stream. We own land on Green River below the land we are seeking to condemn and I am satisfied connecting with it.

Redirect examination:

In reference to the financial responsibility of our company, the directors are W. S. Montgomery, president and treasurer of the Spartan Mills and Laurens Mills, large mills, H. L. Bomar, attorney, Spartansburg, Jos. Lee, president and treasurer of the Blue Ridge Hosiery Mill, Landrum, Geo. Ladshaw, civil and hydraulic engineer, A. L. White, President Merchants & Farmers Bank, myself and W. A. Law, vice president First National Bank of Philadelphia, and C. W. Tillett. I am informed the unusual conditions now existing prevails all over the United States. I hope they will not continue. I am president and treasurer of the Saxon Mills, Chesney Mills, Central National Bank of Spartansburg. Have no interest of any kind *of* the Southern Power Company. It is the object and intention of the petitioners in good faith to construct, equip and operate this interurban railway as a common carrier of passengers and freight.

Recross-examination:

I said the individuals purchased this land and it was transferred to the Manufacturers Power Company and stock was issued for the land. These were the seven individuals I mentioned
43 a few moments ago, exclusive of Mr. Tillett, they formed the Manufacturers Power Company. With the organization of the Blue Ridge Company, Mr. Tillett was added. The company as a corporation made the purchase from the same persons as individuals.

The plaintiff introduced in evidence communication to the defendants by the petitioners, dated June 6th, 1913.

EXHIBIT No 2.

"To the Hendersonville Light & Power Co., and Saluda-Hendersonville Interurban Railway Company.

GENTLEMEN: The Blue Ridge Interurban Railway Company wishes to acquire the right and privilege of diverting the waters of Green River from a tract of land containing 76 acres more or less and lying on one side of the river near the Narrows, and more particularly described in deed from Saluda-Hendersonville Interurban Railway Company to Hendersonville Light & Power Company as recorded in Book — at page — of the records of deeds for Henderson County. Such diversion of the waters of the stream is necessary in order to carry out the plans of the company, which contemplate the erection of a dam just below the mouth of Big Hungry Creek, and the conveyance of the waters of the stream, over and across the lands of the company to the foot of the mountain, where the power house will be located in the cove, for the purpose of generating electricity to propel street and interurban railway cars and other

machinery. To obtain this easement the Blue Ridge Interurban Railway Company is willing to pay more than it is worth, as its plans are urgent, it therefore offers to pay for the easement the sum of One Thousand Dollars. If this offer is not accepted by 10 o'clock, A. M., Saturday, June 7, 1913, our company will assume that it has been refused.

BLUE RIDGE INTERURBAN RAILWAY COMPANY,
By HORACE L. BOMAR,
Director and Agent.

This June 6, 1913."

44 Plaintiffs offer reply thereto,

EXHIBIT No 3.

"HENDERSONVILLE, N. C., June 7, 1913.

Blue Ridge Interurban Railway Company, Mr. H. L. Bomar, Director and Agent.

DEAR SIRS: We have your valued favor of 6th inst., stating your desire to acquire the right and privilege of diverting the waters of Green River from its natural channel at a point above what is known as the Narrows and thus dry up the stream and destroy our water power located at the Narrows and for this privilege you offer us what you claim is more than it is worth, i. e. One Thousand Dollars.

We regret exceedingly that we can not see our way clear to entertain your proposition, but as you well know, we are engaged in serving the public with light and power, and it is our intention to develop our water power at the Narrows for use and addition to our present plant and with this end in view have our plans in hand and expect to start development work immediately.

While we propose to develop our holdings at the Narrows as we now own, we would be very glad to obtain the south half of Green River opposite our holdings and while we can't say that we are willing to pay you more than it is worth, yet we do say that we are willing to pay you more than we paid for our present holdings and in order that you may see how we regard this matter and realize the value we place upon our holdings, we beg to say that our present holdings at the Narrows, which consist of the north bank of the stream with all rights to the center of said stream, cost us Thirty Five Thousand Dollars, and our engineer's report shows that we can develop same by means of a wing or diverting dam use half the water in the stream and obtain 1300 H. P. twenty four hours per day. As a matter of course, if we can obtain from you the rights to the other half of the stream and the necessary land to de-
45 velop fully this water power, we could obtain at the lowest 2600 H. P. and with this end in view, we herewith offer you for the necessary land and rights to enable us to fully develop this

power, the sum of Forty Thousand Dollars, and hope to obtain a favorable reply from you within ten days.

Cordially yours,

HENDERSONVILLE LIGHT & POWER CO.

By R. M. OATES, *President.*

Plaintiffs offer in evidence

EXHIBIT 4.

"JUNE 7, 1913.

Mr. R. M. Oates, President, Hendersonville Light & Power Co., Hendersonville, N. C.

DEAR SIR: Yours of the 7th received. From it it appears that your company has refused the offer of Blue Ridge Interurban Railway Company for the privilege of diverting the waters of Green River from the Torrence tract. We cannot, therefore, agree upon a price satisfactory to us both and the matter will have to be fought out in the courts in condemnation proceedings.

I note what you have to say in regard to the purchase of property belonging to our company across Green River from the Torrence tract. Your offer to purchase this property will receive attention at the next meeting of the directors of our company. In the mean time please define what you mean by "the necessary lands and rights to enable us to fully develop this power."

Since the Torrence tract calls for Green River as a boundary I can not conceive how you figure out that this tract alone constitutes a water power. A wing dam on a stream the size of Green River is an impossibility without infringing on the rights of the property owner across the stream.

I might say in order to be clearly understood that I regard your company's trade with the Saluda-Hendersonville Interurban
46 Railway Company and your letter to which this is a reply as a very clever effort to magnify the value of the easement we are seeking to acquire.

Very truly yours,

HORACE L. BOMAR."

Plaintiffs introduce letter from Hendersonville Light & Power Company to Horace L. Bomar, dated June 15, 1913.

EXHIBIT No. 5.

JUNE 15, 1913.

Mr. Horace L. Bomar, Director and Agent of Blue Ridge Interurban Ry. Co.

DEAR SIR: Your favor dated June 7th inst., but postmarked Spartansburg, S. C., June 11, 6 P. M., is duly to hand and noted.

In reply to the second paragraph of your letter and your request for a definition as to our meaning of "the necessary land and rights to enable us to fully develop this power," we beg to say that we can see no ambiguity in our words as they are plain English and none of them are capable of double meaning.

By reference to the last clause of our favor of the 6th inst. you will note our request that you answer favorably our offer to purchase as contained in said favor within ten days. Since you have not done so, we conclude you refuse and as we cannot agree upon a price satisfactory to us both, the matter will have to be fought out in the courts in condemnation proceedings.

Yours truly,

HENDERSONVILLE LIGHT & POWER CO.,
By R. M. OATES, *President.*

Plaintiff introduces letter from H. L. Bomar to R. M. Oates, President.

J-NE 19, 1913.

47 EXHIBIT No. 6.

R. M. Oates, President, Hendersonville Light & Power Co., Hendersonville, N. C.

DEAR SIR: Your letter of the 18th to me as director and agent of the Blue Ridge Interurban Railway Company, has just been received. The limitation of ten days which you put on your offer was overlooked by me. I have been hoping for a favorable opportunity to call a meeting of our directors and give you an official reply. From the tone of your letter, I take it that this is unnecessary for two reasons: First, you have not defined what your offer included, and second, your offer is withdrawn or has expired by limitation.

It is a matter of great regret to our company "that we can not agree upon a price satisfactory to us both" for the easement we need and that "the matter will have to be fought out in the Court in condemnation proceedings."

Very truly yours,

HORACE L. BOMAR."

JOS. E. SIRRINE, being duly sworn, testifies:

Live in Greenville, S. C., am a civil and hydraulic engineer, have been in that business twenty-four years, have had a good deal of experience in that time, have been connected with the development of the Albany Power and Mfg. Company, Belton Power Company, Gaston Shoals plant on Broad River, owned by the Electric Manufacturing Power Company. It would be very difficult for me to give a very comprehensive definition of a water power. Technically it might be said to be a combination, a stream of water, and a head that could be used to produce useful energy. Have been on Green River twice but have never seen the plants. I saw the stream at what is

known as the Narrows to a point something over 2,000 feet above and some 600 or 700 feet below there. Mr. Jos. Lee was with me the last time and Mr. Sam Justice and a gentleman named Johnson. The first time, there was Mr. Lee, John A. Law, Mr. W. S. Mont-
48 gomery, M. C. R. Willard, and Mr. Johnson. January, 1914, was the first visit, and the last was Thursday of last week. I made no estimate of whether or not a water power could be developed for the reason that it would not be possible to divert half of that water without affecting the rights of the party owning the other half. Unless a party had a right to build a dam entirely across the stream and to divide the water exactly at all stages, he could not so divert a part of that water without having an unequal division of it at certain stages of the river. If he took his half at low water he might take more than his half at high water. It would be a physical impossibility to put a diverting dam in there in such a way as to equally divide the water. Below that the water would spread itself out in the channel and tend to lower the bed of the stream and level of the water in the stream. I don't know of any such dam on small streams. I do not know of any in any part of the country on streams of that size. Assuming as a fact that the defendants own only one side of this stream, I would not think they had so. I don't think it is physically possible for them to secure, if they own it, exactly half the water, and as I understand the rule of riparian rights, I don't think they own it, and I would say they have nothing that would enable them to have a water power without acquiring rights from the other owner. I know of one development on Hungry Creek above this and one on the main stem of Green River owned by the Green River Manufacturing Company. They have a dam there that has storage capacity. I have never seen the development on Big Hungry but it belongs to the Hendersonville Light & Power Company. I have never measured the fall at the Narrows and therefore I can not speak of my own knowledge how much fall could be obtained there? I have measured the water shed on the maps. Have never measured the amount of head that might be obtained there, therefore I am not in a position to estimate the amount of power that could be obtained. I have heard it mentioned in this case before.

49 Cross-examination:

In giving the definition of a water power the question of a market is not taken into account. I don't know the amount of fall there. I stated that my knowledge of the land covered 2,000 feet above and 600 or 700 feet below. I am not prepared to state the aggregate of the fall or the average fall per foot as you go down stream. The only knowledge I have of the flow is my knowledge of the basin which feeds the stream. The drainage area is 87 square miles. A riparian owner owning only one half the stream could not develop a water power for the reason that he could not take up and control one half the stream at all stages of the river. I am only familiar with the character of the stream within the limitations I have men-

tioned. Whether or not an intake could be constructed so as to take up that water and put into a canal or pipe and use approximately one half of that water would depend somewhat upon definition of "approximately". I do believe it could be done in such a way that the variation on one side or the other would be within 10 per cent or 15 per cent of half of it at all stages of the river. If he had the legal right to do it, it would be a power of some kind within the definition of a water power.

GEORGE E. LADSHAW, being duly sworn, testifies:

Live in Spartanburg, am one of the directors of the plaintiff company, am a civil and hydraulic engineer, have been engaged in the business forty years, have had considerable experience in this country, built three plants in Rutherford County, Caroleen, Henrietta and Cliffside, five mills at Spray, and quite a number of others, built a water power and transmission plant across the river below Asheville and also on Pigeon River, and am building a plant at Eatonton, Ga. Am familiar with the plans of the company for the development of the Big Hungry on Green River. We propose to build a dam below the mouth of Big Hungry and empound sufficient water there to get power. I think the dam will be 142 feet. The water empounded there will be carried by a pipe
50 and feeder to Henderson's Island three miles below, the power house will be located at Henderson's Island. The gross power produced that way would be 58,000 H. P. Power for four months would be 58,000 H. P., for the other months very much less. Twelve months would be very much less than that, probably in the neighborhood of 30,000 H. P. There is more water in the stream to produce power for four months than at other times. The flumes necessary to carry this water would be on the south side of the stream. The Torrence tract is on the north, or left, side of the stream. We do not expect to run the flumes on the Torrence tract. The company owns all the land from the dam down to the bottom of the mountain on both sides except the Torrence land. The company interested in this development owns about 15¼ miles from the head of the holdings down the river front to the foot of Turner's shoals. The head of the petitioning company's property is about half a mile above the railroad bridge at Green River. Turner's Shoals is about 2½ miles from Mills Springs in Polk County. The shoal above that is called Foster's, above that Fish Top, above that is Hungry Creek, and above that Potts Shoals. Fish Top, Potts Shoals and Big Hungry are interrelated. We only own one side of the stream at that point, and we have to divert the water at that point to pass his land through our feeder. As an engineer I approve the development as proposed at the mouth of Big Hungry as the most efficient development of the stream. As an engineer I think that the proper development to make of that stream. The properties can not be properly developed except by ac-uiring the right we are seeking to acquire in this case. The company has adopted these plans with reference to

development. The Green River Manufacturing Company, owned principally by Messrs. S. B. Tanner and J. O. Bell, have a development on Green River above the property of the plaintiff. The Hendersonville Light & Power Company have a development on Big Hungry above the petitioning company's land. I have been at both these developments. Never was at Mr. Oates' dam, have
51 heard him talk of it. I have been at the power plant. The Torrence land along Green River has been surveyed thoroughly under my direction. Have been there myself. I think there is no question that it is impossible to develop only one side of the stream into a water power, because you could not determine one half of the water in the stream only for a certain stage of the stream, and that would not be a development, and also you can not take any part of the water out of the stream and leave one half for the opposite owner. He could not get one half of one half,—if one half of the water at any stage was taken from the stream the opposite riparian owner, if building below that point could only get one fourth. The bed of the stream at this point is solid rock. A man almost takes his life in his own hands to get along that stream. I don't think there has ever been any development there, I don't think anybody would be crazy enough to get in there to make a development. The amount of power depends upon the volume of water, and upon the volume of water passing during the time in which it can be utilized in any manner. We don't utilize water during the night, then consequently your water has to pass during the day. No development could be made there that could give storage; it would depend on just what is passing,—just the flow of the stream. It would depend on what was left after the other reservoirs were used. The Green River Manufacturing Company has a reservoir that effects the power of the stream very much; their reservoir has a capacity of something over 30 acres, 35 I think. It takes twelve hours and over to come back after they draw it down five feet. I don't think they can draw its water more than three feet. When they draw the water three feet and shut the gates, it cuts the water in two at the Narrows. It is just about half the 87 square miles at the Narrows. Whatever amount of storage Mr. Oates has,—whatever was left, they wouldn't get quite 45 square miles down there. If you take the whole stream as was stated in our former trial and suppose there was no reservoir to retain the water and also took the normal flow, there would be something like 1300 H. P. but if you take strictly primary
52 power and the amount left after the Green River Manufacturing people have shut down their power, you would only have between 400 and 700 H. P. Assuming conditions as they are with reference to the dam and the Green River Manufacturing Company and Mr. Oates, if the defendant company owned both sides of the stream at the narrows, they would not have a commercial development that would pay. As an engineer I could not recommend the purchase of that property to anybody for the purpose of electrical development. I don't see how such a development as that could be operated under the conditions that exist at the

present. I understand the Torrence land fronts 160 poles, half a mile on Green River. The plaintiff company owns the lands immediately above that on the same side of the river, acquired it from J. H. Jones. There are between 3500 and 3600 feet on the Jones land, a little over 1,000 feet difference, the Jones land is that much longer on Green River. I have understood we paid $2,000 for that land. We ran a line of the proposed road from the dam to Saluda, and also from the dam, I think we stop just above Tuxedo. From the dam to Saluda we got less than 2 per cent grade; we come up Camp Creek valley to the Southern Railway, and parallel the Southern railroad to Saluda station. We get less than 2 per cent grade over the line. The line from there to Flat Rock is better still, we had more room. From the surveys I made I certainly was pleased with the outlook for the development of the railroad. It is a good line. I think it is the intention of the company in good faith to construct this railroad and operate it as a common carrier. We have never had any other intentions to my knowledge. The run of the stream at the Narrows is,—primary flow, 52 second feet. The distance on the front of the stream is just half a mile with 218 feet fall. A dam can not be built there that could give any storage, you would have to depend on whatever water is running in the stream. The proposed dam of the plaintiffs would embrace about 200 acres.

53 Cross-examination:

Am a civil and hydraulic engineer, have had about forty years' experience, am the civil and hydraulic engineer of the Blue Ridge Interurban Railway Company at this time. We have employed various other engineers. I have been acting as consulting engineer for the last year. I guess I stated in the former trial that I signed the petition for condemnation in the previous case against the Hendersonville Light & Power Company. We talked of a dam 164 feet high and we talked of building one 75 feet high, then I think there was talk about one 90 feet. 164 feet was a maximum height. We would not submerge anything at the No. 1 plant of the Hendersonville Light & Power Company. 164 feet backs water to tail water of the Hendersonville Light & Power Company's present plant. I did not understand that 164 feet submerged that and that the court restrained us permanently from that. In the former trial I was testifying from the actual notes. If I stated that the fall between the lower edge of No. 1 and No. 2 of the Hendersonville Light & Power Company was 50 feet, it was from the map. I don't think that I ever said anything about that because I don't know that I ever knew that. I believe upon examining that map that it is about 50 feet. We never expected to interfere with the No. 1 plant. I don't think we were enjoined from overflowing No. 2, I think we got a judgment for $6,000. If we were stopped at No. 2, that would take 50 feet off the dam. I am not familiar with the fact that the Court has settled that fact. Don't you think you have your figures pretty badly mixed? 50 feet from 164 feet would leave 114 feet. 22 feet off 164 feet would be 142 feet. I don't

understand why you take 50 feet off that. I have had nothing to do with taking that off. I admit the fall is 164 feet from the water under the bridge below the Hendersonville Light & Power Company's plant down to the point where we propose to build the dam. 50 feet from that was tailwater of the power Mr. Oates called No. 2. I don't know where the 22 feet comes in. I can not answer the question as to whether if the disclosure was that the height
54 of the dam must be reduced 22 feet in order to avoid overflowing No. 1, that that would reduce the height of the dam to 142 feet. Assuming that it must be reduced 22 feet, that would leave 142 feet. I think I can explain that 164 feet. That was merely an arbitrary height we determined on ourselves. 164 feet was limited by Mr. Oates' property but 142 feet we did not understand was limited by anything but it may be limited by our purchase of the Hicks Jones property. What we have determined about building the dam has nothing to do with this question. We can build it any height we choose. We can build 164 feet and not interfere with the Hendersonville Light & Power Company. I swear that. I don't know anything about an injunction granted against us. I say we can build 164 feet without interfering with the Hendersonville Light & Power Company. I said a man would be crazy to undertake the development of this water power. You could develop 479 H. P. that is a crazy proposition. I am stating the facts when I say that 400 to 700 H. P. can be developed. I made several reports on that property.

(Witness was handed a paper by counsel, who stated: I show you what purports to be a report on proposed water power development on Green River, Henderson-Polk Counties, and ask if you did not submit that report on these properties?)

That report was stolen out of my office. It does not make any difference whether it was submitted, it was stolen out of my office. That report was made for White and Ladshaw. It was not made for anybody. I suppose that is my signature. There might be doubt about that, I wouldn't swear to that signature. I didn't admit that that was my report and signature on the last trial. The one that was shown to me last time had no signature on it. I don't know anything about the signature, that report was not submitted to anybody, it was not made for anybody, it was made for White and Ladshaw. I suppose I did make the report. I suppose I didn't make an untruthful report. It is true.

Q. I call your attention to page 2 of the typewritten por-
55 tion of your testimony. You say "Now I know that $30 per H. P. is cheap for this property and feel sure we can get it." You were talking about water power?

A. Let's find out about that $30. You evidently don't understand what that means. That question can not be answered in the way you are asking it. I will have to read the paragraph that precedes that; that is not a part of the report; it is some notes that were made and I did not make them, I don't know anything about that. I did not admit on the examination that I made that entire

report. I did not report that this water power in the raw state was wor-h $30. You told the jury that but I didn't say so. That lacks common sense. "The price of $33 per H. P. for primary power only is very low. I know of no property selling as low as this for the last five years. A large power company recently gave $50 — — —" That is a part of the typewritten report that I did not have anything to do with and don't know anything about. The report is a printed report and that typewritten sheet is attached. I didn't notice that last Court and don't think it was there, I doubt whether it was there. That mark Exhibit A is very easy to put on there. I don't know where these typewritten sheets came from. I know nothing less about it now than I knew last Court I know something more. I didn't notice that typewritten sheet. I didn't swear to the $30. That $30 is not a value at all, it is a cost, that is the cost of development. I do say that printed part is my report. I never gave a value in my life on a water power. I made that report but didn't put that typewritten part on. I don't know anything at all about it. It seems to me that has been added. I never made any supplement to my report that I ever saw. I never heard of that typewritten part before. If I ever did any thing of the kind I don't remember it. I don't know how that came there unless you folks put it there,—you may have done that. I say I doubt very much if those typewritten sheets were there when I was examined at the last trial. I didn't notice them. I was examined as to that report but I swear I never gave a value,—never
56 gave a value in my life. I gave a cost of development, that is not value. If there were any figures given, it was given for the cost per H. P. for developing. It was not value. I say it can not be developed profitably because not more than 400 to 700 H. P. can be developed and that is my reason for stating that it would not be a profitable commercial venture. I heard the testimony of Mr. Oates as to the amount of his development and he claims a great big power he has not got. He has a steam plant. He hasn't got 350 H. P. 400 to 700 H. P. might be profitable for a very small enterprise. Mr. Oates hasn't got the market here for that, he would have to go further. If he had the market for 450 H. P. at the price he gets for power he could afford it. There is no market, therefore your question as to whether developing 400 to 700 H. P. would be the venture of a crazy man don't apply, the market is always considered. We have got to go 50 or 75 miles to get a market for the 30,000 H. P.—to Asheville for one place. There is a good market in Asheville for it. I don't know anything about those things, but I am satisfied there is. There is an excess of power in Asheville, but still there is a good market there, and has been for a number of years. I developed the first power that was ever there. We have not completed the survey of our road. I don't believe I remember the date of the charter of the Blue Ridge Interurban Railway Company. It is about two years old. That charter authorizes us to build a railroad from Saluda to Hendersonville. We have not got it done, we have been held up by you. We

couldn't develop our property without we could buy yours. I think we are the plaintiffs in the suits. I guess I did swear to the petition. We must have brought the suits. We have not broken any earth for the railroad, have done nothing at all. We have come over to a point somewhere east of Flat Rock on the survey. The maximum capacity of our development will be 50,000 H. P. What it takes to run the railroad will depend entirely upon what business is being done. It takes about 75 to 80 H. P. to run a car. There would be very little of this power that we could use for railroad pur-
57 poses. For railroad purposes we have to have primary power. I couldn't tell what we are going to use it for. The railroad is contemplated to go in various directions from the base line between Saluda and Hendersonville. We have not surveyed any of those. I am satisfied we are going to Rutherfordton and Spartanburg very soon. It is only a very short distance from here to Saluda. We could use 10,000 or 15,000 H. P. for the railroad. These legal matters have prevented our making arrangements for any of the other cars or lines. I have never understood that our main purpose is to supply the cotton mills of Mr. Montgomery and others in Spartanburg; of course I have heard of that. The cotton mills afford a first class market; we are talking about going to the cotton mills at Marion and there is one of our power lines has been directed in that direction. I rather think I signed an affidavit reading: "That W. S. Montgomery, John A. Law, A. L. White, Jos. Lee and certain other business men who were associated with them some seven years ago, and since, for the purpose of securing power with which to operate certain cotton mills with which they were connected or interested at or near Spartanburg, S. C., investigated among other streams some of the water powers on Green River with the result that various tracts of land and water powers were purchased from time to time with a view of ultimately developing and utilizing same through electrical transmission for the purposes aforesaid. I have to be a little particular about these things. I think that is genuine. I have heard of these things before.

Redirect examination:

There is every facility at Big Hungry and it is easy to get in there. The place is accessible. We considered it a good building point. A man practically takes his life in his hands to go in at the Narrows at all. It would be very expensive inde-d to attempt to do anything at that place. The expense would be out of all proportion to the results obtained. That is one of the elements in determining the feasibility of developing a water power. We go
58 to great expense to obtain that. There was no calculation made except an estimate. It is almost impossible to make a survey of that property. I don't suppose you could more than get a line through there. I think it would be very foolish to attempt a development at the Narrows. 164 feet is the maximum possible development at the mouth of Big Hungry without interfering with

the Hendersonville Light & Power Co., now existing. My orders were that we should not interfere with the operations of the Hendersonville Light & Power Company's plant. The report I had printed at one time refers to Green River for some distance up and down. That report was never issued by me in an official form. It was made for Mr. White and myself and was never issued. In no report I ever made of the property was I able to make a sale of the property so as to develop it. I think there were three reports made on that property prior to the time this company had anything to do with it. I made two reports for the Speculation Company and afterwards made this report for myself. The Speculation Company was trying to sell at the time. It was sold to us at public sale through the Court. That petition that was signed by me includes a number of tracts up and down Green River. I think the first property that was bought was at Turners. I could not say when because I was not interested at that time. W. S. Montgomery, John L. Law, Jos. Lee and Mr. Horace Bomar were interested at that time. This report refers to power up and down the river and also to the Appalachian Power Company. It was some time after the property was bought at Turners Shoals that the company was merged with the Appalachian Power Company into the Manufacturers Power Company. After the merger was made the property at Turner Shoals had been practically all bought up for the purpose of development.

Cross-examination:

I don't remember if I stated in the first trial that to build a dam at power No. 2 would cost $21,000. At the present time I don't think it would cost anything like that. I couldn't
59 say whether I swore that. I don't know what the question was. It may have been something else. A dam could be built at No. 2 very cheap. I made the statement that "I was at Mr. Oates' No. 2, and a dam 25 feet high would have to be 150 feet wide. I estimate the top of the wall at about 100 feet. I would go about 50 feet on either side. I think to build that dam would cost in the neighborhood of $21,000. In my report I was reporting on these developments one at Camp Creek, Hungry Creek and Potts Shoals. That 5900 H. P. included probably included three or four hundred of empounded water. I certainly included empounded water, because there is no such thing on that river. You have got to empound the water to get any power. The $30 per H. P. refers to the 5900 H. P. which I explained included 300 to 400 acres of empounded water. To develop small powers depends upon the circumstances of the location. It is true that the greater the scheme of development, the smaller the cost if you have the poundage. The greater the fall and the larger the dam, the cost of developing per H. P. might be very much more costly. I rather think those notes of $75,000 to $80,000 were typewritten. I think those were probably $7,500.

Redirect examination:

I have been over the lands that have been acquired by our company; the land owned by the defendant company is very rough lands, merely one side of the gorge. I didn't see a foot of it that was suitable for agriculture. The timber is very small, there might be a few sticks of commercial timber. The total area acquired by the plaintiff company is about 5,000 acres. There is some of it very fine rich bottom and some timber land. A good deal of it is precisely like this land. It would take a right smart rabbit to get over a good deal of it. Some of the land acquired by the plaintiff from the Speculation Company is well timbered. We have acquired all the rights in the deeds from the Speculation Company to build tower lines, and those were included in the purchase price of $200,000.

60 Cross-examination:

I am familiar with the appearance of the land on the petitioners' side of the river, it is just as bad as it is on Mr. Torrence's side. We bought the land entirely for water power purposes.

Maj. T. B. LEE, being duly sworn, testifies:

I live in Charlotte, am a civil engineer, mechanical engineer and hydraulic engineer, am the father of Jos. Lee and interested through him in this development. Have had a very large experience in hydraulic engineering. The first was building a canal in Columbia about three miles long developing 30,000 H. P. Since then I have been in various enterprises. I came out at the solicitation of my nephew to assist him in organizing the Catawba Power Company. I did what was wanted until Mr. Duke came in as owner of it and it was then changed to the Southern Power Company. All the plans on that road were OK'd by me before being adopted; I was consulting engineer. I made several surveys and we have a large project on now embracing 25,000 H. P. My experience has been approximately 50 years. On the Green River property we commenced at Turner's, about 2½ miles from Mills Springs, made an examination up to Fosters about seven years ago, and we then went to work and employed a good levelman and transit man and had the water power surveyed at Turners, Fosters and up the river to Fish Top, a quarter of a mile about the Howards Gap road. We had an accurate transit survey made and had a line of levels run and tested. We then had a topographic map made of the property to determine what could be done with it and the amount of land required to build dams of certain height. We had the thing in good shape, options obtained on a good many properties. The options were closed afterwards and I in company with Mr. Lee inspected these lands very carefully, have been over all of them. I have not been over the Torrence lands, have been at the lower end and upper end, know where it is and its character. I had men go in

there and make reports to me on which I based my opinion.
61 It is a very difficult place of access. I suggested certain developments, suggested the development at Turners, Fosters, and Fish Top, which is the lower end of the Hungry development, suggested a dam to be built at the month of Hungry river and back the water ¼ of a mile above the Howards Gap road bridge. We had made no survey up the river. It was suggested by me to bring the water from the Hungry development down along the south side of the river and use it at the Henderson and Lee line down at the cove. That is the only proper development. In order to make that development it is necessary to make the diversion asked in this suit. We can not get water unless we do and water is necessary to develop it. In my opinion the ownership of one half of the stream on one side don't constitute a water power, because it is simply a water fall. A water power consists of three elements, water, fall and some place to put the development of that power. You must make an application of it. This third element is wanting and the water is wanting. My plan of developing that, we would have to own both sides of it before I would consider it at all. The plan I propose if I could control both sides or owned above and below this property would be simply to dig a canal on the north side of the river and carry it out, digging a tank or reservoir for the water to go in; from that point I would put a steel pipe line down to Pullians Creek. This would be a very expensive proposition. An engineer can not go to the moon but he can do anything on earth if you give him the money. I dislike to give facts because I have not made an accurate survey of it. As to the power you would get there, I would have to inquire the conditions you are working under. If I had the stream unobstructed and control of it, and a fall of 218 feet, assuming that it is not obstructed by any dams or developments above, you might get 2,000 H. P. there with the maximum flow. I know of a development above there near Tuxedo, the Green River Manufacturing Company, and one on Big Hungry owned by Mr. Oates. We could not assume that the stream is uninterrupted because those are there. It then becomes very largely an in-
62 termittent power which we call secondary power. With these conditions existing there I would estimate there would be about 700 H. P. there of which 400 would be secondary power and 300 primary power. It would cost $79,000 to do that, approximately. I don't propose to make these figures positive. This primary power we suppose could be sold in Hendersonville with a twelve mile line costing about $800 per mile to get it there, and the secondary power could be sold at $12 a H. P. I assume those figures because we can put a steam plant there that will develop the same power for less money in Hendersonville. It will cost more to put that power there and maintain it, it would be a dead loss of probably $300 or $400 a year and in my opinion it would not be a commercial proposition. The advantage of electrical power is its adaptability. A commercial waterpower is something that don't cost as much as you get for the production and yields a good in-

terest on the investment, not less than 7 per cent or 8 per cent. My opinion is that if I was sent to investigate the power at the Torrence tract, including the property across the stream owned by the petitioners, by any one wishing to buy it, I would advise them to let it alone because it would not pay them to develop it with the conditions existing there and the further condition that there would probably be other developments above there than those now. You could build saw mills, grist mills and saw mills on that property but it would be pretty hard to get in there. I don't say the power is absolutely worthless but we are considering the question of transmitting that power to a market. The drainage area of Green River at the property in question is 150 square miles or something like that. The drainage area below the two dams that have been referred to as already existing is about 38 miles. The minimum flow of the stream is .6 per second foot per square mile. The ordinary flow is 1½ second feet to the square mile,—that is the flow about nine months in the year, according to the Government reports so far as we have them. They are very unsatisfactory. Assuming that there is 218 feet fall on the Torrence property and as-
63 suming that the owner of the Torrence property also owned across the stream the same amount of land so as to control the stream, about 2,000 H. P. could be developed on the land. For the three remaining months, it would be about ⅓ of that; that is assuming that there are no interruptions above there. I would like to state that this water fall has no storage to it, which would naturally affect the value of the power. If you put a dam there you back water on property you don't own. It would have to be developed without a dam. An intermittent power, a power that is not constant is secondary power, it is liable to interruptions. Take the dam on Green River, above Tuxedo, the Green River Manufacturing Company they have drawn down their dam say 3 feet, then shut down the water. That cuts off the flow from the river. The water ahead of that will go on and supply power at the Torrence land. When it is shut down there is no water coming. They will have to wait probably six hours before they get any more water on that branch at all. Suppose they run their dam down on Hungry river. The flow that is going down to the Torrence land will actuate the wheels until the end comes, then there is no more water except what comes in below the dam, the 38 miles drainage area. There is a stream that comes in called Jonathans Creek, and a little stream above the Howards Gap road. That 38 miles is that drainage area and there may be some spring branches coming in. The constant power you would get is only that power that is below the dam. The other power would be secondary power. I can not answer as to whether there is a market in and around Hendersonville for secondary power. Having no storage to catch the water as it goes down, it has to be used when it goes down or not at all. What I have stated as to the cost of development at the Narrows is approximate. I estimated the cost in order to utilize this power at the Narrows at about $79,-000. I think when you go to test the matter it will cost more than

that. We would have to sink a canal out from the river on the North side to carry that water. That canal would have to be excavated into solid rock part of the distance, and there would
64 have to be a pipe line over 1500 feet to carry the water to the wheels. The generator would cost so much, the wheels so much, the dam so much, to get a load in there so much, and paying $10,000 for the property. The amount of power produced on the wheels is one thing and the amount delivered is another. In this case the amount of power produced that is salable is about 60 per cent. We estimate that the wheels would produce 75 per cent, the generators would lose 5 per cent, transmission would probably lose 10 per cent and some other. In estimating whether or not it would pay to make a development I have estimated every bit of the power produced, primary at $25 per annum and $12 for the secondary. If all that is generated and delivered is sold instantly and all the money collected, getting $25 a H. P. for primary and $12 for the secondary, in my judgment it woulld not be a commercial proposition to develop the Narrows. If I was sent there to investigate the matter I would report to my employer to let it alone and go to work and build a steam plant to furnish power in Hendersonville, right at the point of delivery. It is very bad engineering to develop a plant on the minimum power. You must develop it on the general run and be prepared to supplement that power in the low water months with steam, then you can handle the whole project as primary power. Take this property and by means of a steam plant you can make it all primary power. I regard that as a small power and the tendency is to let small powers alone. I don't mean to say by that that this property of the defendant company has no value at all. It could be used for a good many things if you could get in to it, flour mills, saw mills, grist mills, you might put a small plant right down on the river. My opinion is that taking it as a whole and using it as such, it is not such a proposition as a man of means would take hold of. If the defendant owns but one side of the stream, there is no water power there at all, it is simply a water fall. A water power consists of falls, water and ability to apply it. In this case you can not apply this water to anything that will generate power, and until you use this
65 third element to make a water power you have no water power. I can say as to developing on only one side of the stream, that it is possible to take the water out, but whether it will satisfy the parties or not is another question. You can take out half and that water that has gone down as a half is spread out and you can not tell who it belongs to. It is altogether, in my opinion, impracticable. I never saw a similar case to this. I finished about 100 miles of electric railroad for Mr. Duke. I know a good deal of the country you propose to build the railway on. As long as ten years ago I found from my observations and Government maps that it is entirely practical to build a road through that country from Spartanburg up Green River across to Hendersonville and still further. I investigated as far as Knoxville, I tried to get the Seaboard interested in this road. I had them in my office and in-

terviewed them with regard to tending this road from Knoxville, that they would have an easy road. I tried to get the Southern. I heard your company got a charter and at the time I was engaged with other things. Before I transferred my interest to my son in the Green River development project I investigated how we would build the Hungry development. I saw it was absolutely necessary to build a line from the railroad down to Hungry and also a branch of it down to Fish Top to put the machinery and material in. I have had experience on the line with the Southern Power Company and knew what I could save in that matter. When I took service with the Southern Power Company I induced them to build a line. They built it at a cost of $180,000 and they have saved the cost in machinery and freight and afterwards sold it for what it cost them. I knew that if we were going to develop Hungry we had to build a railroad from the Southern Railway to the dam and to where we proposed to put the power house there and I made a thorough investigation and an estimate on it. From that I think it was something to be recommended for a public service corporation. I did not make an estimate with a view to making a public road. I could see no reason why it could not be applied to
66 the use of the public afterward. I know this country through here, it is developing rapidly. I can not say as to from Saluda to Hendersonville. It ought to be extended to Rutherfordton to connect with the Seaboard, and to Ashville would be a light line to build. This line from Hendersonville to Hungary by Turners is a favorable point. That is practically the same line I recommended years ago to the S. A. L. I have had no connection with Southern Power Company for four years, and nothing to do with the Piedmont line since last February. I have $500 in stock and a note for $400.

Cross-examination:

Am the father of Jos. Lee; he is largely interested in this: I have done a great deal of surveying for the Southern Power Company at different times; first commenced surveying for that company in 1903, and ceased to work for the Southern Power Company about four years ago. I built the line from Greenwood to Spartanburg and from Charlotte to Gastonia. Mr. Duke owns those lines mostly. I was paid for my service and have not been engaged with him since last February. The dam of the Green River Manufacturing Company is five miles above the proposed dam of the company. I only know those streams I have mentioned running into Green River between the green river manufacturing Company and the Torrence land. I dont' know Laurel Creek by that name. I only know one Doggins Creek and that is about 1-4 of a mile above the Howard Gap road. Big Hungry Creek comes in between. I have only been up that creek. The obstruction to the enterprises below on the same stream caused by the Green River Manufacturing Company are just such as are usual in the building and running of enterprises on the same stream, but I don't know that it is exactly everywhere as it is there. There are often a succession of factories

all operated by the same stream, and the interruptions to which I refer are such as are usual in such cases, and it is against their
67 utility. This factory is usually in operation and discharges the water which it is using to operate its machinery and it has an intake of water into its pond and for much of the time there is a discharge practically equal to the intake. I have the details of how I made the estimate of $79,000 as the cost of the development on the Torrence land. I have seen both ends of this property, have never been through it. I put a man there in whom I had confidence and who furnished me the data to make it. I can speak as to the cost of cutting a channel only from the reports of my subordinates. Necessarily the report of such a body of land as that from its very nature must be extremely uncertain. We make all the notes from the data furnished by the surveyor and those estimates are made from data in the office. I am willing to admit that on a final estimate, that the estimates would be modified. It is apt to be modified against it as costing more. I am not familiar with the plan of the petitioners as to their construction, am familiar with it to a certain extent. I know that they were going to put their flume on the other side. To carry the flume on the north side would cost more because it is more irregular. One advantage of carrying it on the south side is the smoothness of the mountains and subsidiary streams going in. It was my scheme to carry it on the south side. I have no report from my subordinates making the south side more feasible. I know it would be more costly on the north side from personal observation. I have been on the lower end on the other side, going in from the east and on the upper end going in from the west. I went along all the way on the south side along the top of the ridge. have not been down at the river bank. When this flume reaches that point they are 200 or 300 feet above the river at the Torrence land. It must be 300 yards, maybe 400 from the south edge of the stream up to the top of the ridge where I went. That is all the observation I have had of either side. I have reports of my subordinates. I have a report of the amount of fall from the head of the Torrence land to the foot, but haven't it here. I know from the mouth of Hungry to Pullians Creek is 286 feet. I don't know
68 the fall from the mouth of Hungry to the top of the Torrence tract. I haven't that data here. The flume from the 140 foot dam would start 120 feet above the bed of Green River, and would be, by the time it reached the Torrence land, at least 200 feet above it on the slope of the mountain, maybe more or less. I don't know as I said that the railroad from about the mouth of Big Hungry to Hendersonville would be a practical business venture. I said that I proposed to build it down there for the purpose of building that development and it would be highly profitable to the company and could be used afterwards for public utilities. I don't know what view they took of it, that was my view when I was interested. We couldn't build that railroad unless we were in a position to get a right of way to build it. I don't think there are many people from Saluda to Big Hungry. To carry this railroad down Green River and connect with some other railroad would be neces-

sary in my opinion to constitute this a profitable venture. A terminal between Big Hungry and Hendersonville was the fundamental idea of the railroad.

Redirect examination:

In my experience as an engineer I have seen the beginning of many of the large trunk systems. Last spring I made an examination of the Durham Southern, and that is a paying road. Most of these things start from a small beginning at first and circumstances arise that tend to make them profitable. Railroads tend to build up the country.

J. E. SIRRINE, being duly sworn, testifies.

As I understood the last witness, the drainage area below the existing dams on Green River and Big Hungry is 38 square miles, but the witness testified that there might be expected to be a minimum flow of .6 cu. feet per second per square mile, which would mean a flow of about 22.8 cu. feet per second, based upon a 218 foot head and upon an over-all efficiency of 60 per cent, you would have 340 primary H. P.; the other power would be secondary power for the reason that the uninterrupted flow would only be in excess
69 of .6 for a portion of the time and therefore could not be supplied at all times. There are two things that tend to make the rest of the power secondary. First of all the flow of the water from the water shed is interrupted by the storage above. If those dams were so located and operated that they released the water at the right time they would not be an obstruction, but as they are not in the control of the operator at the lower place, and as it takes some little time for the water to reach the lower place, you couldn't depend upon using the water from those sources for primary power. Any other power that they have in excess of their ability to supply the customers power must be secondary power. The secondary power comes from two sources. There would be one class of secondary which would be due to the difference in the run off by the normal water. On that you would have some reasonable notice of diminution, the flow would gradually diminish and gradually increase. If you were selling that to a customer you could give them some notice of when you were going to close down. Upon the other secondary you could not know when it was coming and would not be in a position to sell to such customers as could be taken off on short notice. In the first classification it would amount to about 500 H. P. which would be vailable about nine months of the year; the other classification it would be very difficult to say what it would amount to because the interruptions are not known. I think it would be very difficult to form any estimate although it might amount to as much as 700 to 800 H. P., which would be a rather undesirable class of secondary. I know of no market in and around Hendersonville for that class of secondary power. I don't think I heard Mr. Oates say that there was no market for that class of power in the last trial of this case. I did in another case. As I understand it I don't think it would be feasible to develop that power.

I think you could get the same amount of power from some other source cheaper. From the knowledge I gained of that property from the testimony, even if both sides of it were combined, I would not consider it a feasible development. We
70 were called in some time ago by the Piedmont Manufacturing Company at Piedmont, who had operated a cotton mill for forty years. When they first built there were no dams anywhere near them. About seven years ago a power company built a dam ten or fifteen miles above them for the purpose of supplying power to Greenville, and the effect of that dam was to put the water there at three or four o'clock and as a consequence the Piedmont Company was obliged to use steam two third- of the time. We were called in to advise them as to whether they had any recourse. We advised them that the development was reasonable and that their misfortune of location was something they could not help. The result was that we had to supplement that power with practically 1,000 H. P. of steam, due to the dam above. We had some storage there. They have none out at the Narrows. If it was serious there, it would be very much more so at the Narrows. When the water was at low flow there was not a great deal of difference; they would store water and turn it loose in practically the same volume. Our storage was sufficient to take care of the water four or five hours. I don't recommend any plant that has no storage at all.

Cross-examination:

I heard the statement of Maj. Lee as to the drainage area. This statement of the power development is based on that. There is no discrepancy in my estimate and his. My statement is that you would have approximately 340 H. P. primary as a result of the water originating on this 38 square miles; and that you would have 1 1-2 times that secondary. Then you would have for the secondary power,—that is power delivered to the customer,—which might run to 700 or 800 H. P. That brings my total up to about 1550. If you take his 2,000 H. P. and take 80 per cent of that discrepancy disappears.

Jos. LEE, being duly sworn, testifies:

Am a son of Maj. Lee, live at Landrum, am one of the
71 owners and director of the plaintiff company. I have acted as purchasing agent in acquiring this property. I tried to buy this property from Mr. Torrence. According to instructions of the company I went to Gastonia and met Mr. Torrence at his office on Feb. 14, 1913. He wouldn't name a price and I offered him $1,000, and he refused, saying any ignorant farmer would give him that for the land. I told him I would give him that for the water rights. I thought that a fair offer. I am not sure that I knew at the time what it cost him, I only know now what I have heard. I don't recollect hearing him say what he gave for it. I bought the property along Green River just above the Torrence tract for the company, one *one* side I bought from Mr. Hicks Jones, it has considerably more river front, and 40 acres of land, paid $2,000 for that.

Mr. Oates wrote me a time or two in reference to buying that, and wrote me in reference to paying such "a hell of a price" for it. That is Mr. Oates' letter I received from him.

Plaintiffs offer in evidence letter from R. M. Oates, marked Exhibit 7.

That refers to the Hicks Jones tract that I bought later and paid $2,000 for. I originally had an option on it for $400. The tract he speaks of as owned by the heirs is a tract on the south side that I bought from the King Jones heirs, it had the same frontage as the Hicks Jones land. That was their price in the purchase of that land. From my experience in buying these lands I thought I was offering Mr. Torrence a good price. Mr. Torrence claimed to own the lands at the time. A good deal of the land bought by the company is good farming land, and timber on it. None of the land in question is fit for agricultural purposes that I have seen and I went over it pretty carefully. If it is fit for agricultural purposes and stock raising I think there would be plenty of water going down. Billy goats might live there but I doubt it. I never heard of there being a mill in there. I don't think it is practical to build anything of that kind in there. I have been in there several times, but I usually take a guide. It is very rough. I first became interested in Green
72 River about 1907. Silver Creek was the first tract I bought, eight or ten miles below Hungry. I became associated with you, (H. L. Bomar) John A. Law and W. S. Montgomery in the purchase of that property. That property was expected to be developed for running mills and for any other purpose power was wanted for. The plaintiff company was formed for the development of this larger power in February a year ago. I have been over the ground pretty thoroughly with regard to the location of the railroad. It certainly was our intention in good faith to build and operate the railroad as a public utility. We have not altered our intentions in the slightest. This suit is the principal cause of the delay and the only one I know.

Cross-examination:

The development has been delayed by these proceedings; I suppose we brought the proceedings to clear up this piece of land. I was at one time interested in the Manufacturers Power Company. The Blue Ridge Company succeeded that company. The Blue Ridge Company is a North Carolina corporation. I do not recall the exact date of the charter. Those matters I have left almost entirely to the President and Treasurer. I don't know whether at the time we got our charter permitting us to build a railroad I had ascertained that we could not condemn a water power in North Carolina. I thought that one water power could condemn another. I thought an interurban railway could condemn. It was our intention to build an interurban railway. The letter which was put in evidence was before this suit was commenced. That land had more river frontage, but it is true there is more water fall on the Torrence land. I considered the offer I made Mr. Torrence a fair one. I

made the offer direct to Mr. Torrence, he stated he owned the land; at the time we owned the land on the opposite side. That is not for sale. Our company has refused to take $40,000 for it.

73 Redirect examination:

We refused to take $40,000 for it because that would practically ruin our whole development. We could-'t afford to lose $200,000 for $40,000.

Cross-examination:

There was a proposed development at Turners and one above that. The Torrence land cut up the other, but from a storage basin standpoint it would effect the lower property.

Redirect examination:

It would seriously reduce the value of the whole property.

J. F. JONES, duly sworn, testifies:

Live in Blue Ridge township, ¾ of a mile from Green River, have known Green River 50 years. I know the body of the Torrence land but couldn't follow the exact lines. I don't know whether it would be difficult for any body to go over the exact lines; it is rough; my understanding is that one of the lines goes down the river; have known this land 50 years; my father sold it to my brother and he sold it to D. L. Morrison. I would have taken $1,000 for the right to divert the water from this land if it had been me. I know something about other land around there selling to Mr. Lee. People willingly sold to him; we thought they were liberal prices.

Cross-examination:

When I say $1,000 is a liberal offer, I have in mind the land as agricultural land. I don't know anything about the water power.

Redirect examination:

Am not a civil engineer, know nothing about water power.

W. S. MONTGOMERY, duly sworn, testifies:

74 Live in Spartanburg, am a manufacturer, connected with the Spartan and Chesney Cotton Mills actively , with the Pacolet mills and Lockart mills as director; am vice president of the Merchants & Farmers bank. Am President of the plaintiff company, have been since its incipiency; it is the intention of the company in good faith to carry out its plans for building a railroad and erecting a dam for the developing and sale of power.

Cross-examination:

Have been president since the incipiency of this company; held the same office in the Manufacturers Power Company. It was

not merged into the Blue Ridge Interurban Railway Company, the Blue Ridge Company succeeded to its stock. I did not know during the existence of the Manufacturers Power Company that under the laws of North Carolina one power company could not condemn another; I am not a lawyer. I probably heard that talked during the time. I can not say I did. I have heard that under the laws of 1907 an interurban railway company could condemn. February 13, 1913, the Manufacturers Power Company was changed into the Blue Ridge Interurban Railway Company and began operations in this state and pretty soon thereafter the company instituted this pproceeding to condemn the water power and land owned by Mr. Oates and the Hendersonville Light & Power Co., I think the proceedings to condemn the Torrence land was done about the same time.

JOHN A. LAW, recalled:

I recall the circumstances connected with the effort to purchase this property from Mr. Oates and Mr. Torrence. Mr. Oates came to Spartanburg at one time, bringing a lawyer, Mr. Jerome with him, and had a conference with the company; that was in connection with his own tract on Hungry Creek.

Petitioners rest.

At the close of the plaintiff's evidence, the defendants move to nonsuit. Motion overruled.

Defendants, respondents except.

75 Exception No. 1.

The defendants, respondents, offer the following evidence:

R. M. OATES, duly sworn, testifies:

Live in Hendersonville, have lived here nearly twelve years, am President and general manager of the Hendersonville Light & Power Company, own about 99½ per cent of the stock. Mrs. Oates and Miss Peden, our sectretary, own the other ½. Our company acquired the land sought to be condemned in this proceeding from the Saluda-Hendersonville Interurban Railway Company by purchase, and hold a deed for it. I bought it primarily for the purpose of developing it. I first was induced to consider purchasing this property by the beginning of condemnation proceedings by these gentlemen in the neighborhood, among them my Big Hungry powers. When they started these condemnation proceedings, having had some negotiations with them and failing to arrive at any satisfactory price with them, I wanted this to develop and use in connection with my present power in case they succeeded in taking my Big Hungry powers. They were successful in getting what I call my No. 3 power leaving me my No. 2 power which I have since developed. I started the light and power business here in April, 1903, operating by steam but finding it unprofitable I bought what is known as the Bozier Case Mill Shoals and developed that in 1904. I saw from the growth of my business that the amount of power

suppplied by that would soon be exhausted and bought the No. 2 power. In 1909 I bought from Hicks Jones my No. 3 power with a view of developing that as the business grew and the demands called for it. I have developed No. 1 and No. 2; No. 2 has just been completed. I had a demand for No. 2, had to use probably $2,000 worth of coal during the past summer because I did not have it. I started to develop it in 1907; the panic coming that year broke up my financinal arrangements and I had to discontinue that. I had started my dam. Before financial matters had gotten adjusted, my No. 1
plant was washed away by a flood, and I had to devote my
76 energy to rebuilding that. I rebuilt that 1700 feet further
down stream. I acquired the property sought to be condemned in this proceedings for development in connection with my powers as demands arose; I anticipate such a demand. It can be reached in 1½ miles from my No. 2 plant; we estimated it will take two miles of line to connect them. That is a carbon copy of a letter I wrote to Mr. Law. Mr. Bomar handed me a letter on the 6th of June, 1913, in which he offered $1,000 for the property known as the Torrence land and gave me twenty hours to accept or refuse it. This is a copy of the letter, (Exhibit 2). I answered it on the 7th and declined; at the time I wrote that letter I was holding my site to be used in connection with and in addition to my present holdings. At that time I made that offer of $40,000 it was a bona fide offer. I did not have the money in the bank but I renewed that offer by letter, of which this is a copy. I made the offer on March 21, 1914, in the letter which I wrote Mr. Law.

Defendants offer this letter in evidence, marked Exhibit A.

Defendants offer in evidence letter of John A. Law, marked Exhibit B.

That was a bona fide offer of $40,000 I was willing and able to comply with it, had $40,000 in the First Bank & Trust Co., of which W. J. Davis is President. Exhibit B is Mr. Law's reply to my letter. That description in my letter to Mr. Law,—I did not have the land surveyed so I could give that description, so I merely continued the line from the Torrence tract across the river and up and back and included in the boundary 38 acres, which runs back only half the distance from the river that the Torrence tract does. It is the water I am seeking. My idea was to get the water power and develop it. I did not consider the offer of $40,000 unreasonable by any means. I figured that if the total power available from the combined lands was 2700 H. P., that would be $75,000. That development could be made inside of $75,000. I have an investment that cost more than that that is profitable. When I returned from
Raleigh after the passage of a bill which I thought would
77 protect my property I learned that the gentlemen on the
other side did not consider that a bar to their recovery. I thought if they were successful in taking my Big Hungry power, I would have nothing to fall back on, so I called Mr. Torrence up and asked him to meet me in Spartanburg, which he did and I told him the plan which I had evolved. He said he would consult his associates and let me hear from him. He did and I went to Bessemer

City and concluded the transaction. I procured a deed and gave a mortgage for the unpaid balance. I paid $1,000. This transaction took place in March and on June 7th, upon my refusal to sell this property for $1,000 these gentlemen began condemnation proceedings. Owing to my ownership of the property only to the middle of the stream, my plan was to take out half of the water by means of a diverting dam, and convey it on the north bank to the mouth of Pulliams Creek, utilize it through my water wheels and turn it back into the river on my own land. I have had several estimates made as to the cost of that development, and have had it surveyed and worked out by several engineers, the first was Mr. Chas. E. Waddell. The estimates I made were necessarily based on my own experience,—I am not an engineer. I have had estimates made by engineers and they all exceeded my own. My estimate is that the power can be developed for $37,260 in the manner described by me. I place the canal and forebay,—these figures were made by my engineer and myself jointly,—the figures covering cost of flumes, generators, etc., are bona fide quotations from the manufacturers,—canal and forebay, $1,000; 2750 feet 42 inch pipe, $4.37 a foot delivered, hauling 2750 feet at 15c; laying 2750 feet at 50c, two 500 KW generators 600 RPM. Hauling generators, 10 tons at $3 per ton, three panel switchboard, $750, foundation and buildings, $1500; 1,000 KW three phase transformer, $3500; two 650 H. P. 600 R P M water wheels and accessories, $6,000.00; two miles of transmission line built of No. 4 copper wire, $1,000; lightning arresters and power house sundries, $500, incidentals, $350, making a total of $35,486.50; 5 per cent to cover unforeseen expenses, $1774; total $37,260. That estimate includes hooking
78 up to the power we are now using. According to my estimate we would develop 1310 H. P. and 80 per cent delivered in town, that is 1040 H. P. but I base my calculations for revenue on 1000 H. P., which would be decidedly profitable to me. Cost of operation would be, foreman, $900, assistant $600, helper $400, making a total of $1900 for the manning of the plant. Maintenance, insurance, taxes and depreciation, 4 per cent, $1500; oil and supplies, $200; 6 per cent on the investment, $4400, total operating cost $8,000 a year.

I was the pioneer in the light development in this section. I started the electric light business the first of January, 1903, started building my plant, a small steam plant of 60 H. P. in April, 1903. That deed dated 12th day of March, 1913, recorded in Book 79, page 264 of the records of Deeds for Henderson County is the deed to the Narrows property. That deed is executed by the Saluda Hendersonville Interurban Railway Company, W. A. Mauney, President, J. M. Torrence, secretary. That describes what is known as the Narrows land. I gave them a draft of $1,000 in accordance with the proposition made the gentlemen. That is the mortgage we gave, recorded in Book 34, page 438 of the mortgage records, Hendersonville Light & Power Company to W. A. Mauney, trustee. This is the report of Col. Ladshaw.

Defendants offer in evidence report marked Exhibit C.
Objection by plaintiff overruled; plaintiffs except.

That is the report that was introduced in evidence at the last trial of this case. It was secured for me by Mr. Torrence. I have seen a copy of this report elsewhere.

Objection by plaintiff sustained; defendants except.

Q. I wish you would read this supplement as to the value?

Objection by plaintiff to question asked witness overruled; plaintiff excepts.

Witness here reads Exhibit C.

By the Court: Gentlemen of the Jury, this instrument
79 you have just heard read you will only consider as impeaching evidence if it does impeach Ladshaw, and not as substantive evidence.

I have made some calculations and have some plans to develop my side of the Narrows.

Q. According to those estimates and plans how many H. P. do you anticipate you can develop there?

Objection by plaintiff overruled; plaintiff excepts.

1360 H. P. I have to take the Government reports as to the drainage area. A. H. P. is that power necessary to raise 33,000 pounds one foot a minute. The power demanded to run my plant in Hendersonville is decidedly variable. My peak load is reached about the middle of August, which is 400 H. P. During the month of February,—my lowest demand,—my load is approximately 150 H. P. I have available in my present No. 1 plant 350 H. H. No. 2 which is just completed will add 200 H. P. If the increase in demand continues for the future years as it has for the past three or four years, I will have reached the limit of power available from No. 1 and No. 2 in three years and for that reason I want to retain the Narrows property for development to add to the present supply. It is a mere matter of developing the Narrows property and connecting it with the present wires at Big Hungry, simply connecting the two developments by a transmission line two miles in length. The cost of that is inside of $1,000. The line to town is already built.

Q. Tell us your plans for the development of the Narrows and how you expect to do it, the cost of it, what profit there will be in it?

The plaintiff objects to this evidence and all other evidence tending to show that the defendants or either of them have a water power capable of being developed by using one-half of the water in the stream at the location in question. It is understood and agreed that this objection shall apply not only to this testimony but to all other testimony offered in the case, and it shall be understood that the objection is overruled and the plaintiff entitled to an objection

without having same specifically entered at the time of the testimony.

80 A. It simply involves the use of a diverting dam; it is merely a projecting wall built into the stream to divert half the water of Green River into a canal or race which we will use for a certain distance to a settling basin where we can accumulate water and acquire a static head and then convey the water by means of a steel flume to wheels in the power house situated at the mouth of Pulliams Creek, and the power applied and transmitted. The cost of that development will be $37,500. I figure the 1360 H. P. on the basis that the drainage area of Green River being 90 square miles, the average run off being 1½ cu. feet per second per square mile, gives 120 cu. feet per second as the water flowing on an average. We will be entitled to use half of that, 2600 cu. feet per minute. That multiplied by 62½ multiplied by 219, the total fall,—which will not all be available—something like 211 feet, would give us 1360 H. P. as available from the the water if there was none lost. Water wheels do not give you 100 per cent efficiency. We have just installed two wheels where the guarantee of the manufacturer was 82 per cent, so figuring that the efficiency obtainable will be 80 per cent, we have 1088 H. P. available on the wheel shaft. We will have about 953 H. P. available in Hendersonville. If we take 1360 H. P. at the $30 valuation placed by Mr. Ladshaw, it figures $40,800 for the undeveloped power. Taking my present power supply and the amount of revenue derived by me from it, the development of the Narrows property with 1360 gross, 953 H. P. net I could obtain a revenue from that of $45,000.00 a year with an operating expense of $15,000, which would leave a net reveue of $30,000 a year from the develpoment of this property. The cost of the property taken at $35,000, the development at $37,500, divided by 1360 H. P. available means a cost per H. P. of about $55 for the developed power. I have been up and down that thing from top to bottom, have explored it twice. It is a rough county but as for the cost of installing that plant and the feasibility of doing it, I can only say that when I developed the No. 1 power after the flood washed it away, I installed 1700 feet of flume
81 exactly similar to what we will have to have at this place. There was no way to get down to the right of way to haul a flume in. There was a hillside road we built 150 to 200 feet above this. We distributed this flume there and let it down section by section. We installed that flume without an accident at 50¢ a foot. That includes one trestle of 100 feet by 30 feet high. The cost of installation on the north bank of the Narrows would be less than at the No. 1 plant. There is a road way on top of the ridge running to the upper end of the Narrows. This road could be continued at a nominal expense. Our pipe could be let down the side of the mountain as I did before, with a block and tackle. I think there is a site for the power plant and one protected by nature. There are large rocks projecting out into the stream, I should say 20 feet high and just below those rocks to build a power

house no flood would ever touch it, and there is ample room for the tailway all on the land of my company. I can develop 1360 H. P. on the side of the Narrows belonging to me. If I owned the whole stream I could of course develop twice that much or 2700 H. P. at 60 per cent additional cost. $55,000 to $60,000 would develop the whole property. It wouldn't cost twice as much to develop both sides as it would to develop half. The larger your generator the less its costs per H. P. If I owned on both sides of the stream as these gentlemen seek to own I could develop 2720 H. P. Valuing that at the price testified to, $30 H. P., would make a price of $81,600. That was used by me as the basis of my offer of $40,000. If I could obtain the south bank of the Narrows for $40,000, I would have the entire property at a cost of $75,000. The developing cost would be less than $75,000 and I would have the whole thing completely developed for less than $60 per H. P. I wrote that letter Exhibit 7, on the 10th of May 1909, about five years ago. That referred to the land Mr. Lee bought from Mr. Hicks Jones between the mouth of Big Hungry and the upper Torrence tract. That has a river frontage of something like 3500 feet with, my recollection is a fall of 62 feet. There is 2600 feet of river front on the Narrows with a fall of 219 feet. The
82 amount of water and the fall make up the value of water power. I know something of the increase of the value of water power in this section. I know that this very Jones land that Mr. Lee testified he paid $2.000 for was held by him under option for $400 and that increase came about in less than three weeks. I also know the Warren Staton tract was once held under option for $1500, the holder of that option did not avail himself of it, renewed it for $2,500 and Mh. Staton finally sold that for $8,000. It was about three years from the date of the option to the sale. That property is not for sale now. I don't know the size of the Green River Manufacturing Company. I was in the cotton mill business ten years and in round figures an ordinary spinning mill will take about 25 H. P. per thousand spindles. For a 10,000 spindle mill it will take 250 H. P. On that basis our power available at the Narrows will run a 30,000 spindle mill. Grist mills don't take over 6 to 8 H. P. I am talking about what we own at the Narrows. I can not think of anything further than that the value of water power certainly has not lessened in the last few years. For a long time such powers as the Narrows were absolutely worthless. You get something in there but it would be difficult to get it out. The advent of electricity has brought into the market and made valuable many powers heretofore worthless.

Cross-examination:

Alternating current has been discovered and put into practical use approximately 18 to 20 years. Long distance transmission of current has been known and in use approximately that long. That is the advantage of alternating over direct current. They are making progress every day. Now the limit is anywhere from 110,000 to 150,000 volts but the difficulty and only limit in the voltage is

finding proper insulation and means of handling it. The knowledge of the use that such property as that has been put to by reason of the facilities for carrying it out and using it has existed fifteen or twenty years, a long time before I wrote that letter and told Mr. Lee he was paying a hell of a price. I was using this long
83 distance means at the time. Probably nothing has happened to make an increase in the value of property on Green River but the knowledge that these things were valuable. I am talking about the knowledge of the owners of property. I bought a lot of property down there myself. I paid more for some recent property than for the first. I think the Staton property was bought by the Kuhns. They were from Pittsburg. My understanding was that the Kuhns were large and successful promoters of various enterprises and that they were invited into this field by these gentlemen from Spartanburg to help them carry out their plans White, Ladshaw, Mr. Lee and Mr. Bomar, and then the allies fell out among themselves. They went to trying to block the game. I don't know that I can tell from whom I got the information that the Kuhns were started by these men. I did not get it from the men who are here to answer. I have discussed it with them and they have practically denied that. I have had a great number of talks with them and I don't know who said this or that. In the letter I called them the Pittsburg gang. I understood that they had a regular financial war for the control of the Spartanburg Railroad, Gas and Electric Company. I can not say that I have been in consultation with A. B. Leach & Co. I have no connection with them whatever. I understand Mr. Knox is general manager of the Spartanburg Gas and Electric Company. I don't think I have ever had him in consultation with me and my attorneys; I had him as a witness in the first trial. I can not say that he stated that he was in league with the Kuhns. I figured that the developed power at Big Hungry would cost $55. I don't think I said what I would sell it at per H. P. I said using the amount available at my present plant as a basis and taking the amount of revenue derived from the power I have, this power would produce a net revenue of $30,000 per year at a total cost of about $75,000 for development. I meant that was what the thing would net out eventually. Of course I would have to sell the power before I could get the revenue. That is 40 per cent profit per annum, but how many "per annums"
84 would I have to hold that before I would get this $30,000. I might have to carry it fifteen years before we got up to that point. My present business I conducted at an absolute loss for four years. My peak load was between 350 and 400 H. P. this year, that meant my highest load. We have no name for the antithesis of that point, but we generally meet that point in February. I suppose our average load would approximate only about 200 H. P. an average of that 24 hours a day. The average peak load throughout the year I would say was about 200 H. P. A rough average would be 270 H. P. My average daily load today is only about 90 H. P. In the summer it is increased very materially by some you use. While I had my peak load in the summer time the

current production at the No. 1 plant was only about half my output, about 200 H. P. ten hours a day. I couldn't use the stream but half the time. About half my output came from water power and the other half from the steam plant for about six weeks this summer. What I will get for the 953 H. P. delivered at Hendersonville will depend altogether upon the uses to which it is put. I expect to get in round figures about $50 per H. P. ultimately. It depends on what you are using it for. I don't expect to sell it for that for factories. I would sell it to factories for $20 and for lights for $100. Figuring the $30,000, I said taking my present output as a basis. If I was to reduce my price from 10c. to 8c. I wouldn't get as much money. I think the statement said that the plaintiffs had figured a fall of 851 feet. I am reasonably familiar with that country down there and with the plaintiff's figures. They and myself discussed this thing for many months before we got into the fight. Personally we are still friends. I think they start up about the railroad bridge and it figures out 800 and some odd feet. In this proposed development my recollection is they figured on getting something over 600 feet. They first started with a 164 foot dam and reduced it to 142. If they get 142 feet they will run rough shod over the Supreme Court of North Carolina, and if they do they would raise the water 142 feet above the present level. If
85 they locate their dam where they say, th-y will flood my No. 2 place. There is a place where they could build a 142 ft. dam above the Torrence land and they would run rough shod over the Supreme Court. They wouldn't have to to flood the little strip at No. 3. I have not paid Torrence the $35,000, I am not bound by that mortgage. I can surrender it now and lose the $1,000.00 I have paid and let that end it. That is all I have paid. If the land was sold and brought $35,000 under the terms of that mortgage I would not get my $1,000 back. There is some interest accrued. I have forgotten when the interest was to be paid. I have not paid any and don't intend to pay any until this matter is cleared up. If I am allowed to keep it I will pay the whole $34,000 and develop it. Since this suit was started I have placed $40,000 in the bank to buy the other side of the river. That was after the suit was brought, it was a renewal. I did that because when my first offer was made I made it to Mr. Bomar as a director, gave them ten days in which to answer and Mr. Bomar replied after so long a time that he had overlooked that limit. He never did refuse to sell it in a letter, but he did say he regarded my letter as a shrewd move to enhance the value of my land, therefore I put myself in a position to make my offer good and stood ready to do it. I borrowed the $40,000, $10,000 from the First Bank & Trust Company and $30,000 from the Bank of Commerce of Spartanburg. Mr. Glenn is vice president of the Bank of Commerce; I wrote to him in regard to this loan, made application to him as vice president of the bank. I made a demand note for it. I did not know when I got that money that it would not be accepted by these people. I knew that they could develop all the power they needed to operate the interurban road and not need that part of the Narrows or my

property either. I understood that they were projecting a development to make electricity for many other purposes. I knew that they could not develop their so called Big Hungry power with 142 foot dam, and I knew that they were not limited to that development. I think I am safe in saying that I have seen figures
86 by which they could have obtained in round figures 26,000 H. P. at a cost of about $35 a H. P. They now claim by making this big development they will spend two and a half million dollars which will be approximately $45 per H. P. therefore if they carry out that it will cost about $10 a H. P. more. What they own on the other side of the Narrows is just as valuable to me as mine would be to them. I did not simply pay that $1,000 for an option. I can drop it now at my option. I don't know whether I can keep it or not. I am not ging to pay for it until this suit is settled. I don't have to take it. It is optional with my company as to whether or not we will pay for it but I want to say if that property is not condemned and taken from me I will pay for it and develop it. I gave a demand note for the $30,000 and a demand note for the $10,000. I made application for the loan and the loan committee approved it, the application has the endorsement. It was a collateral note and they could have sold the stock and gotten the money. I put up $30,000 of stock with the Bank of Spartanburg. The application for that money was in writing, I don't know whether I have a copy of it. I first discussed the matter with Mr. Glenn in person. I think it is in writing. I can get it for you. The heaviest piece of machinery I would have to put on the Narrows to make the development would probably be 5,000 lbs. I will have to resort to the same means I used to get my flumes in. The road now stops at the head of the Torrence tract, half a mile above and on top of a ridge. I could continue the road around the side of the mountain and let it down. That is a very rough country but no rougher than I have seen before. I can not say how near it would be. In my estimate I made an allowance of $1,700 for unforeseen expenses to cover such items as that. I allowed $3.50 a ton for the installation of heavy machinery. I have always been able to do it for $3 a ton. At the time I bought this property from Mr. Torrence I had not been in litigation for quite a while with the same plaintiffs concerning these developments and was not informed as to what their plans were. The first summons was served on the 10th day of March, 1913, and I bought
87 the property on the 12th. I got the Legislature to pass an act. When this summons was served on me on the 10th of March 1913, in my feeling of confidence and security in this act I did not pay much attention to it. I asked you (W. A. Smith) as attorney for the other side if you were going to push your suits and you said you certainly were and that got me excited and scared, and therefore I began to figure around and it occurred to me to buy the Narrows. When I went to Raleigh I knew that the petition had been filed against J. M. Torrence to condemn this same land, and I knew when I bought this land that it had been conveyed to this company. The condemnation against Mr. Torrence was

made returnable on the 10th day of March. The jury came back and said they couldn't find any property that Mr. Torrence owned. You say the Torrence proceeding was in Court pending when I bought this land. I don't know. I knew you had entered condemnation proceedings against Mr. Torrence. The summons was returnable on the 10th day of March and Mr. Torrence did not come up to fight it. On the day it was returnable Judge Pace appointed a commission and that commission went and viewed the property. Probably it was pending. I didn't investigate as to whether the property appeared to belong to Torrence in this county but he had deeded it and the deed was recorded in Polk. The property lies in both counties. I know of one water power that sold for $60 a H. P., the water power on the Warren station property, the property bought by the agent of the Kuhns. I do not know that that was bought by the parties who were trying to knock out this whole development. I believe I wrote Mr. Ladshaw:

"In regard to Mr. Wood and his franchise beg to say somewhat in detail that I have gone into the matter with a majority of the Board. I have told them just how I figure out the connection between Mr. Wood and the Pittsburg gang and the bankers who have been playing the strenuous block game against you."

That was after the allies fell out among themselves. As to whether that letter dated November 16, 1912 was written before the
88 Warren Staton property was sold, I don't remember when it was bought. When I wrote that letter I was informing Mr. Ladshaw in a friendly way and telling about the people who were trying to block him. I don't remember whether the Staton property was bought by the blockers before or after, but I believed they were trying to block them. They then sold out everything they owned. When this letter was written I regarded them as a gang of blockers. Nothing has happened to change my mind since that I know of. I don't know how much real estate there is in the Staton tract. There is 17 feet of water fall, and I understand it is on both sides of the river. I believe my information is that it is on both sides and the other side claims to own one side. That cost $60 a H. P. there are 134 H. P. I don't know anybody that would pay that much for a H. P. simply to develop it. My powers in the raw state, No. 1 and No. 2, cost me about $10 per H. P. It cost me just as much to operate in February as in August. I don't run by the month but by the year. I may figure by the month merely for my own information. My business produces so much revenue for 12 months. My KW output for the month of August is approximately twice as much as for the month of February. I stated my operating expenses would be $15,000 a year. I figured in that foreman $900. That foreman would not add $900 a year because he would be in charge of all three plants, and not over $25 of his salary would be chargeable to the Narrows plant. I was not figuring to operate the Narrows plant as an independent plant. Running that in connetcion with my other two plants, I have dams where I could store the water and let it out as I need it. By working in conjunction with and in addition to the other two, I use the wire from present

plant to Hendersonville. My estimate of power was based upon 1 1-3 cu. ft. per second, the average run off, and not the low water. Low water has been figured out to 65 per cent of average. The amount I was figuring on is about 1½ times the primary if the minimum is 65 per cent of the average. I figured gross revenue would be $45,000 if sold at the same rate I get now. I sell
89 some power at $30 per H. P. per year. I have two motors supplied on that basis, 20 and 25 H. P. flat rate basis. I figure them so much per KW with a minimum bill of $20.00 month. They use from 15 to 20 per cent more than that so I am selling at less than $20. I have another contract at 1¼c. a KW and one where they pay me 4c. a KW with a maximum amounting to $25, which is regarded as the value of primary power. That is the basis used for the estimate made by the plaintiff's experts, I have used practically the same. My estimate of earnings would necesarily be effected by the minimum flow of the stream but I would not have the secondary power to figure on. 660 H. P. primary at $30. We all know that electric current used for an hour or an hour and a half pays a higher rate, therefore these figures are given solely for power. Then I have figured 333 H. P. of secondary power, $10 for day use and $5 for night. Those figures produce just $25,000 with an operating expense of $8,000, which leaves net $17,000 or 22 per cent. As a great part of the power for night use will be sold for light we will add to the above 373 KW at $80. $10,000 must be deducted from the above if sold for power purposes. Added to the $25,000 above makes a total of $45,000. Total maximum expense, $15,000. If my average selling continued under such a new development as under my present development, I would not sell only half as much and my income would not be $22,500. I base my earnings on my twelve months total. I based it on 660 H. P. I estimated that the amount I would be able to deliver would be 923 H. P. I stated that assuming I would sell every bit of that power at the price I am now getting I would get a total revenue of $45,000. I stated I had a peak load of 400 and an average load of 275 H. P., so I am selling on an average half as much as my peak load. If I could sell only half what I develop I would get only half as much but the excess revenue comes from that peak. Assuming that I am averaging the same on the new plant that I am on the old one figuring on delivering primary power which it takes to fill the contracts I have,—the minimum flow has been stated by all surveyors to be about ⅞ instead
90 of 1.33 and for that reason I have figured on 660 H. P. primary instead of 953. I figure the balance as secondary, for which I have no demand, that demand would have to come in the future. As to a wing dam, if you were familiar with the location as I am you would see that it would not even require the projection at the one location of one third of the width of the stream. That is a naturally low point. We would have to take the figures for half the water, high water, low water and average water. It is an easy matter to measure the amount of water that is being taken out of any stream. I believe in the flume we could put certain metres

that would measure it accurately. As to the total amount of water in the river on any particular day and time, that would have to be a matter of measurement but to figure on taking one half the minimum flow of the stream would be an easy matter. To construct a flume with a weir in it would limit the amount of water. If I figured on half the minimum I would get part of the excess above the minimum by making the weir in steps. It is absolutely useless for any sane man to say that that half of the water flowing down will not spread over the bed of the river. It is a rough country and the shape of the bed of the stream is such that I don't believe one half will be taken out half the time. The Narrows is a very narrow gorge something like six feet wide. Taking half the water that passes through would reduce the amount on the plaintiff's side to ¼ instead of ½, but in a conformation such as that a very steep place, the water on the top goes faster than on the bottom so that the taking out of a few inches of water from the top would probably not make an appreciable difference in the bottom. If you reduce the water one half the top will still go faster. If you take half the water out, it would not reduce the other one half in depth. I don't know how much it would reduce it, but if it reduced it any it would take that much off the plaintiff's side. The other half will be left in the river and he can get it if he wants it. I will give him permission to go over and get it. They couldn't do it without my permission and without going on my land, but they have that
91 permission if they want it. I just remarked that 24 hours was the limit Mr. Bomar gave me to accept his proposition. I would not have taken it in ten days. I just threw that in as an idle comment. I don't know that he told me he did it because he had to proceed at once. I don't think he told me that he was to settle it or bring suit at once; he may have done so; he didn't tell me in the paper. Frankly I expected to be attacked when I bought the Torrence property. I know nothing about what my co-defendants have listed that deed of trust at as a solvent credit. I don't list another man's solvent credits. I don't know what the land is listed at. I know the land has been sold for taxes because I overlooked it. Mr. Sam Justice bid it in and I settled it. I simply paid the taxes, I don't recollect how much, a very small sum. I straightened it out in the spring, may have been June. I don't know what the deed of trust is listed at for taxes. Mr. Torrence lives in North Carolina.

Redirect examination:

I do not know how much the entire holdings of the Blue Ridge Company is listed at; you turn it over and it is assessed. They could get their half the water at the place I did in the same way without touching my property. Basing the purchase on my offer and willingness to pay a total of $75,000 for the 2700 H. P. is in round figures $30 a H. P. I had considerable opposition in passing the act through the Legislature. Mr. Law and Mr. Ladshaw came and one of their attorneys came. Mr. Ladshaw was the same gentleman who was on the stand yesterday. Mr. Guthrie was there, he is a

partner of Mr. Tillett. Mr. Law, who was on the stand yesterday, was there and they all appeared before the committee of the senate. Mr. Guthrie made his speech in opposition to the passage of this bill. The bill would have been passed through the senate two days earlier than it was had it not been for a telegram from Tillett & Guthrie asking them to hold it up until they could get there.

W. J. DAVIS being duly sworn, testifies:

92 Have lived in Henderson County 26 years, have been treasurer of the county for a long time, was county commissioner, am president of the First Bank & Trust Co. Was president of that institution in March of this year. I know by seeing the books that on the 30th of March of this year, Mr. R. M. Oates had to his credit $40,000. His check would have been honored for that amount. Have known him seven or ten years, think I know his general character, it is good.

Cross-examination:

I think Mr. Oates has the reputation of being a fine figurer. Never heard that he would figure a man out of anything that was wrong. Have had some opportunities to visit Spartanburg, think I know the general character of John A. Law, it is good. George E. Ladshaw's is good. Know the general character of W. S. Montgomery, it is good. Know the general reputation of W. A. Law, it is good. Have heard the general character of Maj. Lee, it is good. Don't know as I know anything bad about Jos. Lee. Have heard of him since he has been here, from what I have heard his general character is good. Somewhere about the middle of March I was fixing to go away and they brought up the question of the loan to Mr. Oates before the finance committee and all I asked them to do was to see that the loan was well secured. That was made while I was away. The finance committee passed on it.

B. JACKSON, being duly sworn, testifies:

Am president of the Peoples National Bank, have lived in Hendersonville about 14 years, have lived in the county all my life. Have known Mr. Oates ten years, known his general character, it is good.

W. H. BANGS, being duly sworn, testifies:

My home is in Hendersonville, has been about two years, am employed by the Hendersonville Light & Power Company, of which Mr. Oates is president. Have been in their employ about a year and a half this second time. Prior to that I was here for him
93 two years. I have had considerable experience in electrical and constructive engineering. I was employed in the capacity of engineer of th- Decatur Light & Power Company, Paulding County Power Company, Demorest Light & Power Company, Panola Light & Power Company, have done constructive work in Hender-

sonville, some street railway work for the Laurel Park Street Railway Company, and in charge of the engineering and construction of the No. 2 project of the Hendersonville Light & Power Company. Have been in this line of work about 16 years. Am quite familiar with what is known as the Narrows on Green River. I have run the levels and have been present with other engineers on two different occasions. I know the location of the present power house of the Hendersonville Light & Power Co. I constructed the dam at No. 2. No. 1 is pretty close to 2 miles from the Narrows, No. 2 about 1½ miles; No. 1 is now conneteed with No 2. I figured on building about two miles of line to connect No. 2 with the Narrows in order to avoid the high elevations. My figures are based on about $600 a mile or $1200 to connect this had we a development at the Narrows? The line of the Hendersonville Light & Power Company from No. 1 to Hendersonville is such a line as would convey the extra power that might be generated at the Narrows with practically no expense. It is a matter of electrical connections to increase the voltage. I have consulted with Mr. Oates and made calculations as to what it would cost to develop a water power on the Torrence land. I have the figures as I made them. The drainage area of Green River at the Torrence tract is approximately 89 miles. 84 square miles is the area at the mouth of Big Hungry. Basing the run off on 1.33 cu. feet of water per second and 89 square miles would give approximately 120 second feet at the head of the Torrence tract, the mean flow. Half of that is 60 cu. feet. The fall I determined from the point I tentatively projected for an intake for 211 feet allowing for a friction loss in flume line gives me a net fall of 200 feet, or 1360 H. P. I have recently installed at the No. 1 plant some wheels which under guarantee deliver 82 94 per cent or better. Under test I obtained from these a delivery better than 82 per cent which would give me available for power in Hendersonville 961 H. P. or 1119 H. P. net at the water wheels. That is taking wheels of the same efficiency we now have, which deliver 82 per cent. After a first examination of the location I had in mind a wing dam projecting into the stream. After a more thorough examination I went to the trouble of examining the bed of the stream, measuring the width, etc., I found a low place abutting a portion of land which is an island at high water, from which point a canal running down stream to the north bank of Green River crossing a defile perhaps five or six feet deep at which point we would have a basin for the removal of sand from the water. From that point entering the steel flume for the conveyance of the water from this point to the power house location,—and there is an ideal location for it at Pulliams Creek, still on the Torrence land. There is a protected portion which is the natural protection by a slide from the mountain. There is a rock I expect twenty feet high and slid in. At that point is an ideal location for the free discharge of tail water. This pipe line I figure would be approximately 2750 feet in length, and the flume leading up to the proposed pipe line. I have investigated the cost of getting machinery

into the site, have been from the power house site to the crest of the ridge on two different occasions, have gone in from this direction with the idea of the best possible means of distributing machinery in there. The gorge of Green River is extremely rough, the river bed, the bank on the Torrence side is not cut to any extent by any gorge. On top of the ridge which is on the D. L. Morrison property there is an almost even grade, no steep grades at all, to a point possibly twelve hundred feet from the tentative location of the power house site and an even defile from that to the power house site and machinery would be slid down there. It would be no more trouble or cost to build that flume than the one we have already made. There is no necessity for trestles which we have on our flume line at No. 1 120 feet long and 20 or 22 feet high we would have
95 no trestling to do at the Narrows. We could reach a place from which this machinery could be gotten to the power house. On the public road above Mr. Morrison's house a very good grade could be obtained to go to the crest of this divide which is the highest point above Green River Narrows on the north side, and wholly accessible. These approaches are not on the Torrence land, up to the point from which I said we could grade up; it is on the property of Mr. D. L. Morrison on the Torrence side. If the Hendersonville Light & Power Company could acquire by purchase or condemnation as these gentlemen seek to do in this action both sides of the Narrows half the depth back from the stream of the Torrence land, the development that could be made would necessarily depend upon the volume of water. With the same head it would have a capacity of 2720 H. P. gross, 2238 H. P. net. Without going to the expense of increasing the voltage of transmission, without the expense of any change whatever in our original transmission line, we would deliver in the neighborhood of 1750 H. P. I we owned the whole stream instead of half, to develop, the flume would have to carry twice the amount of water,—the relative cost would be probably 50 to 60 per cent more. I made a calculation that it would cost $37,260, to but a flume on one side. 60 per cent of that added would make about $59,000 for the two sides. A similar development to the one I have testified to on the Torrence side can be made on the opposite side.

Cross-examination.

I do not know of any wing dam on a stream of this size. I did not contemplate a wing dam. You could put in a wing dam that would practically divide the water equally at all stages. There are different widths of the stream. You couldn't divide the water to take care of the maximum flow the stream. My estimate of development is based altogether on the average flow. The minimum flow is given as about 65 per cent of the mean flow, about .8745. I don't know of my own knowledge whether the minimum
96 flow of that stream is less. That is based on Mr. Ladshaw's estimate. I don't know of my own knowledge. You can not get primary power the year around except on the minimum flow of the stream. We could have something besides primary power that

would be available in this territory, but the market for secondary power is not appreciable at the present. We furnish the power we are furnishing on primary power. I don't recall Mr. Ladshaw's and Mr. Lee's figures. My figures would be 65 per cent of 961 H. P. delivered in Hendersonville. I don't know the distance of the tract of land down the river, but the flume would be approximately 2750 feet. Owing to the contour of the country and the 211 foot fall the pipe would be carried on the slope of the stream, then would be carried at enough grade to carry the water properly and above the stream. From that point in the surge basin we would carry it at an angle to the power house. This pipe would extend down the hill to the vent pipe and thence to the wheels. The average day power we are selling in Hendersonville today will run from 90 to 100 H. P. Our highest load is about the middle of August; this year we pulled approximately 400 H. P. Mr. Oates has the readings to base his on from what I told him. If you base the average the year around on our minimum at 150 and our maximum 400, it would be 275. We don't carry the peak load as long as we do the other, but we carry a higher load longer than we do the minimum. Our load will begin to rise in April and begin to fall off in September. The lowest water is usually along in December and January. People who are versed in water power well know when the sap in the trees starts down the water in the streams starts. Our lowest water is ordinarily in December or January. The cold weather freezes the small branches and naturally the low water occurs at that time of the year. Last year was an unusual year, the water was very low, but the summer before was not. We had a supplement with steam the summer before owing to trouble with the wheels. I can not tell what a H. P. generated with steam costs; I haven't the 97 KW hours produced by steam separated from the water. I worked the two in conjunction and know about what coal costs me to put under the boilers. I figured it at the West Nashob Light & Power Company and I recall it cost in the neighborhood of 4c per KW, figured on an annual basis, between $90 and $100 to generate it by steam. They generated from about 250 to 300 KW. A KW is 1 1-3 H. P. That was a new plant. I think that an excessive cost. It can be produced by steam I expect as low as 7/8c depending upon the size of the plant and the size of the load,—somewhere around $30. I wouldn't say that was figured as an average. The cost depends on the cost of your production and the class of the load. I think I know in as much as I was on the test of an 1800 H. P. Corliss engine, delivering power at $22 at Lanette Ga. That o7vedwoAh4Jg4f47-os bm mf g f gf
was net delivered cost at the engine. I can not say that is being done by these other cotton mills, but I can not see why it couldn't be done with the coal on the same basis. Loss in transmission depends on the transmission you have. There is more loss in transmitting it the same distance than there is in a power line. Electrical transmission can be made the most efficient means of transmission there is. Generally the further you carry power after developing it the more loss there is. The size of a line is a great item of expense in

transmission. Copper wire is not worth much now. It is comparatively an expensive proposition. I don't know of my own knowledge the cost of but one undeveloped piece of property in this country and this is No. 2 on Big Hungry. That amounted to I should say about $15. I know what the actual final payment was but don't know what had been paid. I can not say of my own knowledge the price that has been paid for any power in this country. The development at No. 2 was not begun since this lawsuit. I think that was begun in 1907. I drew the plans for that. I built part of the dam and made the excavations attendant to the building of the dam. It was left there until I think April of this year. Then work was resumed to complete the development. I was not here when this law suit was begun.

98 J. W. SEAVER, duly sworn, testifies:

Live at Waynesville, am a civil engineer. After I left Harvard I took two years at the Massachusetts School of Technicology, did not graduate there but went into the field, taking a railroad position and have practiced in all capacities nineteen years since then. The first large work I did was on the sewer work in New Orleans about twelve years ago. Before that I had been instrument man and assistant. Since then I have done a great deal of work in this section on flume lines, building several electrical developments and general practice in Waynesville. My experience as a civil engineer has been for eighteen years. I have visited the lands in question known as the Torrence lands on Green River in Polk County in April or May of this year, in company with Mr. Torrence. We went over what was shown me as the Torrence tract from the upper to the lower corner, then we made a more particular investigation of the falls. Going along the border of the land, we went along the stream. I was called in to express an opinion as to the possibility of extracting half the water of Green River on the Torrence property. I was shown a tree near the water which I was told was the upper corner, was shown a rock in the centre of the creek which I was told was the corner and was shown Pullians Creek at the lower end which I was told was the lower corner. The land was rough. As an engineering proposition I should say it was practicable to develop a water power by diverting one half the stream, commencing on the Torrence land, using it and returning it to the stream on the same. I would use a canal, tapping the creek or Green River near the upper end of Mr. Torrence's property. Would not extend the lower wall of my canal any appreciable distance into the creek but would rely upon the shape of the canal to deflect one half the water. A canal or race is simply an artificial channel. I saw several places which from the examination I made looked perfectly feasible to make such an installation. My recollection is that 80 feet was the nearest one to the head of the tract. The higher up on the tract the intake the greater the power would be. I would
99 carry that half of the stream approximately 150 feet in that canal or race. The three elements necessary to constitute a

water power are, first, water in sufficient quantity, second, fall, and third, the possibility of development. I found what in my judgment would be a sufficient quantity of water, treated as one half the stream to develop a water power found the necessary fall to constitute the second element, and I examined to see if the third element could be met. There is a comparatively level place on the Torrence land near the head of the creek where I proposed to put the canal. I should say that is 250 feet long up and down the Torrence land. The starting place I have in mind is at that level tract near the upper end of it. In developing a water power there is to be taken into account the minimum flow, the average flow and the high water flow. I would adapt the canal to take one half the minimum flow. Would take less than half, about 40 per cent of the average flow and about 33⅓ per cent of the high water flow. The volume of water taken up at the time of average flow would be greater than that taken at minimum flow, and the water taken up at maximum flow would be greater than the volume taken up at average flow. In the last two named instances, in neither case would the amount taken equal half the flow. The wall I would project into the water to form a splitting line to turn approximately one half the water on to the Torrence land would be masonry of some kind. I would build the outer wall about the height of average flow and put a weir in the mouth of the canal to take only half the flow. A weir is a dam in the canal with a notch allowing only so much water to pass over. This canal would slant from the intake, would leave the intake at an angle of probably 45 degrees, would slant somewhat to the end of the canal. That would depend upon the size of the flume and the amount of water you want to carry. This canal would carry the water from the beginning up to the point where it delivered it to the pipe. I would carry it in the canal about 150 feet to the pipes. In my experience as an engineer
100 I have observed wing dams. I could jump across the stream where I saw a wing dam. That was used to put in a hydraulic ram. The next smallest stream where I saw a wing dam was probably 25 feet to run a grist mill. The use of a wing dam is a custom in many places. Have seen wing dams used on two streams in Western North Carolina, one, Richland Creek near Waynesville and another one on a small branch within four or five miles of Waynesville. Richland Creek runs .60 feet, and its width is 50 or 60 feet at the point I speak of the other creek is smaller. Assuming it to be a fact that the petitioners own the abutting lands on the other side of the stream opposite the Torrence land and has equal riparian rights and desires to utilize for a like purpose its power of the stream, they could utilize it in the same manner I spoke of. Could do it at the same place and in the same manner. I don't think there would be any loss of water.

Cross-examination:

My minimum would be the minimum in every case. If it ever occurs that two dams above cut off the flow of water and it becomes

much less than minimum, I would take my minimum at the time when any obstruction above is taken? I would take half the extreme minimum whether it was caused by shutting down the dams above. As to whether I would have a practical development was a point I was not called in for. I was called to see if I could get half the stream and deliver it to the pipes. As a practical question I have not investigated. If the man on the other side did make a development of that flow, if he got out one third and we got out one third, the other would go on down the channel. I could not answer as to who would own the water. I never have seen any practical development of this sort, and never heard of any. That hydraulic ram is just to pump water up to a house. That is my father and I don't know whether he has acquired the other side of the stream since. We simply went there and put in a wing dam to pump water up to the house. I do not know, at the grist mill, whether
101 the party owned both sides of the stream. The man on Richland Creek owned only one side, there was another property owner on the other side. I don't know from a deed where the line was. Don't know whether the man owned all the stream or not.

Redirect examination:

I know several cases where there are powers and powers on a stream. I think such factories are built with that understanding and adjusted. I investigated this as to whether it was impossible to obtain half the water from the stream and put it into our pipes. Whether the whole development was practical I was not interested in. My investigations are practical in the sense that engineers' work is practical.

Cross-examination:

I have not verified them.

D. R. SHEARER duly sworn, testifies:

Live at Knoxville, am an electrical and hydraulic engineer, that has been my occupation 11 or 12 years. I took a course of studies at the University of North Carolina, Polytechnical Institute of Troy, N. Y., and the University of Tennessee. I was connected with the Tennessee Copper Company relative to surveying out a water power, have installed quite a number of electric plants and am now engaged in installing a plant for the State of North Carolina at the Appalachian Training School. I investigated the lands known as the Torrence lands about May of this year, in company with Mr. J. M. Torrence. I examined the head of what was shown me as the Torrence tract for a distance of 300 or 400 feet below the upper line on Green River. I made an examination of the stream with a view of determining whether it is practical for the owner of the north bank to divert one half the stream from the channel, use it for developing for water power and return to the stream on the

same land. As an engineering proposition, approximately
102 one half the volume of the water of that stream can be diverted to the Torrence side and developed into a water power and returned. At or near the head of the Torrence tract I would begin a canal, ditch, or open earth flume around the side of the hill. Would extend the mouth of the ditch into the stream at this point and carry this water around on the Torrence property to a point probably 200 to 300 feet down stream, form a little basin, carry it from there by a pipe, flume or other method to the power house. The side walls would go into the stream from an angle? The upper wall would probably stop about the edge of the stream and the lower end would extend into the stream a short distance. The three conditions of a stream in reference to the volume of water are the minimum or low water the mean and high water or maximum flow. The necessary conditions of a stream to constitute a water power are a stream, a body of water, a fall and natural conditions that allow the application of that water to wheels in order to produce power. I found the water, considered as half the stream, did not measure the fall, but from a casual view of the stream it shows considerable fall. I didn't go to the lower end of the stream but if the stream continues with the same fall, there must be a considerable fall. I heard the alleged fall was something over 200 feet. I would adjust my canal to the low water flow with a view of taking up half the water; that in all probability would not mean half the average flow, but would be greater than the volume at minimum flow. At high water it would be a still smaller per cent of the greater amount of water. Assuming that the riparian owner on the opposite side has a like interest in the stream that would not prevent their developing in a like manner. I am not prepared to say as to the intermittency of flow caused by the water power above because I made no survey of the property above and no measurement of the stream flow. As a practical engineer in the pursuit of my profession I would undertake to contract to divert the water of this stream to the Torrence land in the way and manner de-
103 scribed. I have observed a wing dam on streams probably half the size of Green River. They were used for running saw mills and grist mills; I have no knowledge of the respective owners on the two sides. I have seen wing dams or dams that would be considered wing dams on larger streams but I do not place any at this time except that one in Caldwell county. I do not know the name of the stream. I am familiar with the earning power of small hydro-electric plants and to some extent large plants. I know of a small plant in Butler, Tenn., that has a capacity of slightly less than 100 H. P., used for making electricity for lighting purposes. The earning power of that plant is in the neighborhood of 35 per cent per annum on the investment. I have no accurate data of any others. I have information of the value of crude and undeveloped power.

Objection by plaintiff overruled; plaintiff excepts.

Q. State the information.

Objection by plaintiff overruled; plaintiff excepts.

A. It sold for $40 per H. P. in the crude state. I was called upon to investigate it.

Cross-examination:

I did not measure Green River, did not ascertain what the minimum flow was. I investigated there as to the feasibility of diverting one half the water. If you put a canal at the head of the stream where it touches the Torrence land that at ordinary low water would get approximately half the stream, if the man on the other side blasts out a few feet I don't know what you would get. There is nothing to prevent his blasting. I never have seen such a development as that.

W. H. BANGS recalled:

I know approximately the proposed dam site of the petitioners; it is a short distance below Big Hungry and above the Torrence land? Am only familiar with the fall of Big Hungry to the site of this proposed dam from passing over it, not through an
104 actual survey. I don't recall hearing the petitioners' witnesses state that the fall was 62 feet between the mouth of Big Hungry and the Torrence land. Granting that is so, a dam 90 feet high would give a fall to the Torrence land of approximately 150 feet. A dam 90 feet high, taking the mean flow of the stream without storage 24 hours' power would give in the neighborhood of 1800 H. P. That dam 90 feet high would not interfere with the property rights of the Hendersonville Light & Power Company or the Torrence land.

R. M. OATES recalled:

I have made search for the correspondence I had looking to the loan of $30,000 which I put on deposit in the First Bank & Trust Co., for the purpose of putting myself in a position to comply with the offer and was only able to find an acknowledgment from S. F. Reed, cashier, dated March 17, 1914, and the original loan I made. This is the letter, which is responsive to the letter I wrote.

This letter is offered in evidence, marked Exhibit D.

Cross-examination:

I told Mr. Glenn I wanted to make you an offer and wanted to provide myself with the money. I didn't discuss its value in this suit. I might have said it would have a good effect in this suit. I don't know that he has been most active in opposing your development up here. I don't know that he is a director in the Leach Company. He has never been in conference with me in reference to the litigation. I went to see him in reference to getting this money. We discussed it in a way. Mr. Jerome was never my attorney. I thought he was representing the Kuhns. I told you Mr. Jerome had closed a contract for the sale of my company and I had reserved the right for you to build the dam as high as you

wanted it, for 500 H. P. perpetually. I think that was along nearly dusk. I told you that was the last day, and appealed to Mr. Jerome to verify that. I had a contract to sell to them and they fell down.

105 Defendants introduce charter of the Hendersonville Light & Power Company recorded in Records of Corporations Book 1, page 44 et seq. and also amendment thereto in Book 1, page 162.

Respondents rest.

At the close of all the evidence the respondents, defendants, renew their motion to non-suit.

Motion overruled and respondents, defendants, except.

Exception No. 2.

The respondents at the close of the evidence, and in apt time, requested the Court to charge the jury, as set forth in the following written prayers for special instructions:

1st. "That if the stream, Green River, in its entirety, within the land described in the petition and the land adjoining the said stream on the opposite side thereof, constitutes a water power, then one-half of said stream, being an integral part of said water power, right or property, would not be subject to condemnation, and you would therefore answer the second issue "yes."

To the refusal of the Court to give this instruction the respondents excepted, and this is

Exception No. 3.

2nd. "That the entire stream, Green River, along the water front of respondents' land is a water power and that if the one half of said stream owned by the respondents is condemned for the use of the petitioner, then the value of said one half should be taken into consideration in estimating the amount of damages to which the respondents are entitled, as well as all the other facts and circumstances tending to show the value of the proposed water power development of the petitioner, of which development the lands of the respondents forms an integral and necessary part according to the contentions of the petitioners."

To the refusal of the Court to give this instruction the respondents excepted, and this is

106 Exception No. 4.

3rd. "That if the jury should find from the evidence that the stream, Green River, in its entirety, between the land described in the petition and the land of the petitioner on the opposite side of the stream, contains a water power capable of development, and that such development, when made, has a market value, then it would be the duty of the jury in estimating the compensation to be awarded the respondents for the condemnation of their lands, to

consider the value of such development to which such water power may be adaptable; and if the jury should find that the respondents own one half of the water power capable of development then it would be the duty of the jury to award as compensation to the respondents for the taking of their lands or water rights, one half of the value of such water power capable of such development."

To the refusal of the Court to give this instruction the respondents excepted, and this is

Exception No. 5.

Judge's Charge.

Gentlemen of the jury, I congratulate you upon the fact that this case is drawing to a close. You have sat patiently for two days and listened to the evidence in this case as it fell from the witnesses and you have sat for two days patiently listening to the splendid speeches or argument of able counsel versed and learned in the law, but the most important duty is yours, to render a verdict in this case in accordance with the evidence in the case and the law as will be given you by the Court, and I hope that you may tender a just and righteous verdict in this case that consciously, inwardly it may be agreeable to both sides, if not outwardly. It has been said that corporations have no souls and consciences, but corporations are made up of individual members, and individual members of corporations have souls and have consciences. I hope that your verdict may be
107 a just and righteous one, and such an one as will be satisfactory to all parties connected with this suit.

You must take the law in this case from the Court as given you by this Court. If this Court commits an error, or commits errors in any way in its holdings, a higher Court than this will correct this Court, but no Court can review your findings of fact or review you as to what the facts are in this case.

There are several issues arising upon the pleadings in this case, and some five or six of those issues have been settled or will be settled by the Court,—you have nothing to do with them. I will not even read them to you. There will be only *there* issues submitted for your consideration, two of which the Court will instruct you later on, if you believe the evidence in this case, you will answer the first and second issues, or issues A and B, No, and really when you go out to consider your verdict, you will only have one issue to consider, that is, the issue to the question of damages.

The matters now upon trial before you arise upon a proceeding begun by the Blue Ridge Interurban Railway Company against the Hendersonville Light & Power Company and the Saluda-Hendersonville Interurban Railway Company, seeking to condemn and subject to the use of the petitioners certain water rights or properties which have been frequently mentioned and described to you in the course of the argument and during this trial.

The petitioning company, which the Court will call the Blue Ridge Company, instituted this proceeding before the Clerk of the

Court of this county against these two respondents or defendants, by its petition which was duly answered by the respondents, Oates and the Hendersonville Light & Power Company, raising thereby a number of issues, and in due course under our procedure, the matter came here to be tried and determined in this Court upon an appeal from the Clerk.

The petitioning company, which is the plaintiff, is seeking, as you have heard, to condemn certain rights of these respond-
108 ents, Mr. Oates and his company, either one or both of them, under the law of eminent domain or right of condemnation. It seems to be undisputed that the facts in this case show that there lies up and down Green River in this and Polk County a large boundary of land which this petitioning company claims to own, and that there also lies on the north bank of Green River at or near what is known as the Narrows a tract of land, about 76 acres, which these respondents, Oates and Company, claim to own, and that it has a frontage on Green River of something like half a mile, that the property claimed by the petitioners, the Blue Ridge Company, lies both on the south bank of the river in front *or* or opposite to the property of the respondents and above and below the property of the respondents, that is up and down the river. As the Court understands, it also lies on the north bank of the river so that the property claimed by the petitioner, which it says is useful for water power purposes, lies on both sides of the stream above and below the property of the respondents and fronting it on the south bank where the property of the respondents reaches down to the river.

The petitioner alleges that it needs certain rights which will effect the property of the respondents in order to make an electrical development there and it alleges that thereupon it made a reasonable offer to the Hendersonville Light & Power Company and the Saluda Company, the respondents here, to purchase the rights and privileges which it needs in regard to this stream where it runs between the two proper ties; the petitioner says that it was unable to purchase the necessary rights from the respondents and that thereupon it begun this proceeding to acquire by condemnation those rights, that is, to have it decreed by the Court that upon the payment of proper condemnation, such as might be awarded by the jury and fixed in the decree, the petitioner, the Blue Ridge Interurban Railway Company, would have the right to divert this water so as to take it out of the bed of the stream where it flows in front of the property of the de-
109 fendants, and carry it to a lower point down stream to be used in the development of the water power or electric power growing out of the force and power of the water in its fall and that is what we mean as I have no doubt you know already, by this proceeding in condemnation.

The Legislature of North Carolina has the right, under terms within the limitations of our Constitution, to condemn property for public purposes, and that means by directing that proper compensation shall be made for the property taken, and having that right, it has the right to confer upon certain public carriers and public utility companies the right upon their part to institute proceedings

to acquire the use of property by condemnation, when it cannot be acquired by direct purchase or lease and that is the principle upon which the petitioner is moving here, the petitioner, the Blue Ridge Company, claiming that it is a company organized for such purposes and having by its charter such power as confers upon it the right to condemn land and certain water properties if necessary to the proper development of the other property which it may hold and which it proposes to develop for public purposes in the public interest.

A great many of the allegations in the petition, substantially all of them, as you have heard the pleadings read, are denied by the respondents in their answer, and this raises certain issues of fact which will be answered by the Court upon the evidence offered in the course of this trial, and having been formulated and adopted by the Court to be answered, it is not necessary that they be read to you because they are not submitted to you for your answer or consideration. There are certain issues which will be submitted to you and which I will indicate when I reach them in the orderly discussion of this matter from a standpoint of the law of the case.

Passing therefore these questions of fact I will read you the first issue which will be submitted to you by the Court for your answer, and the Court will instruct you later on that if you believe all the evidence, you will answer this No. Issue A: Are there water powers, rights or property on the lands of the respondents as de-
110 scribed in the petition capable of being developed for the production of electric power or used in connection with or in addition to the electric power already developed and in use by the respondent, Hendersonville Light & Power Company?

Whether or not the land and property in question owned by the respondents or one of them comes within the scope of property subject to condemnation is a matter of law depending upon a finding of fact by a jury as to the nature of the land sought to be condemned and that is put in issue by the pleadings. We will take the law of this case to be in the consideration of this issue that the petitioner, Blue Ridge Company, is vested with the power of condemnation of such lands or property as falls within the scope of the power given to it under its charter and by the General Assembly of North Carolina? There are certain lands and properties that this company could not condemn and can not take over or use. This company has not the power to condemn any water power, right or property of any person, firm or corporation engaged in the actual service of the general public where such power, right or property is being used, or held to be used or to be developed for use in connection with or in addition to any power actually used by such person, firm or corporation serving the general public.

If the land in question and the water rights in connection with that land, of course, fall within the scope of the statement I have just recited to you as to the kind of lands and properties that this Blue Ridge Company, could not condemn, then it would be exempt from condemnation in such a proceeding as we have. As to whether or not it does fall within the exemption clause of the statute which

I have read would be a question of law, but it would be based upon a finding of fact by the jury as to whether this property is a water power or right or property of the Hendersonville Light & Power Company, or I will say of these two respondents, which is being used, or held to be used or to be developed for use in connection with or in addition to power now actually used by the Hendersonville Light & Power Company, one of the respondents here.

111 The burden of showing it is such a property by the greater weight of the evidence rests upon the respondents, the Hendersonville Light & Power Company and the Saluda-Hendersonville Interurban Railway Company, and the Court is of the opinion, gentlemen of the jury, that taking the whole of the evidence, if you believe it all, it is not sufficient to sustain a finding upon the part of the jury that it is a property or property right which falls within this exempton clause of the statute, the act of 1913, or otherwise in law, and so the Court now instructs you, if you believe all the evidence given in this case, that it is your duty to answer this issue A No. The Court so instructs you that if you believe all the evidence in this case, you will answer the first issue No. If this Court is wrong about this, the higher Court will correct this Court, but you must take the law from this Court. The Court knows it is a question of fact to be submitted to the jury, but even then the law is if the presiding judge is of the opinion that there is not sufficient evidence to go to the jury to sustain that finding by them, where the burden rests upon a certain party to maintain it, he may direct the jury upon the whole of the evidence, assuming that you believe it all, to find the issue against the party upon whom rests the burden of proof, therefore I am instructing you that if you believe all the evidence, every aspect of it in which it bears upon this issue, then it is your duty to answer the first issue No. I want to say in this case that I am led to this conclusion by what I conceive to be the law of the case, and that is, that it being admitted that the lines of these two properties at the place in question both run to the middle of the stream, that the Blue Ridge Company owns one half of the bed of the stream on the south side, and these respondents or one of them owns one half the bed of the stream on the north, that each one of them have certain rights in the stream as the titles and rights stand today so in my opinion in law the construction of a wing dam in the manner referred to by some of the witnesses here, supposing that it would develop a water power, would constitute an interference with the rights of the

112 other party in such way that a wing dam, under the circumstances in this case, taking into consideration the location, size of the stream and matters of that sort, could not be constructed so as to make it a water power or water property or electric power property which would fall within the evemption clause of this statute which I have just read to you.

A water power is land or easements in land owned by a party over which the water flows in sufficient volume that by dam-ing it and constructing proper machinery, sufficient power can be produced that would be reasonably profitable of itself or in use or connection with or in addition to other power owned by the party by selling

such power or using it in operation of machinery," and the Court is of the opinion that the application of this definition of a water power in this case or cases of this nature and similar to this one, that it is necessary for us to take the property that we find the respondents have at the time of the proceedings and the trial, without regard to the property of anybody else that may lie on the other side of the stream,—that is, we must consider the holdings of the respondents, and not what the situation would be in the event that the party owning one half of the stream might at some future time be able to acquire the holdings of the owner of the property on the other side of the stream, and the consideration of these principles of law and applying them to all of the evidence that the Court sees in this case, leads the Court to give you the instruction it has given in regard to this first issue.

The second issue is in these words:

B. Are there water powers, rights or property on the lands of the respondents as described in the petition which are being held by the respondent Hendersonville Light & Power Company, to be used or to be developed for use in connection with or in addition to any power now actually used by said respondent Hendersonville Light & Power Co.?

The same instruction which I have given in regard to the first issue, called issue A, I give you in regard to the second issue, which I will call issue B, and upon the same principles of law, and
113 without needlessly going over them again, I instruct you as to this issue, if you believe all the evidence offered by both sides in this case, that it is your duty to answer this second issue, B, No.

There is an issue you will consider and consider carefully, bringing your good judgment, good sense and intelligence to bear upon — when you go out to consider your verdict, and that is issue C.

C. What compensation are defendants, Oates and his Company, entitled to recover for the condemnation by the petitioners of the right to divert the water in the manner set forth in the petition.

It is conceded under the instructions the Court has given you relative to the first and second issues that you will answer those issues No, and it is conceded that the Blue Ridge Co., has the right to condemn this water belonging to the respondents, defendants. That being so, what compensation are defendants entitled to recover at the hands of the petitioners, what amount of money must the petitioners pay these defendants, Oates and his company for the water rights, water power or whatever you may call it? As I stated, for the purpose of answering this issue, you would be assuming that upon the findings of the questions of fact by the Court in addition to your findings upon these first two issues, a decree would be entered in this Court granting to this petitioning company the right to divert this water as petitioned for, and it is upon the assumption that they will be granted that right that you are asked what compensation the defendants will be entitled to receive. You do not need to trouble yourselves about whether this 76 acres of land on the north side of Green River belongs to the Hendersonville Light & Power Company, or to the Saluda-Hendersonville Interurban Railway Company, its

co-respondents. There are certain contentions made by the Blue Ridge Company about this ownership as bearing upon the question of the amount of compensation you are to award in your verdict, but I am not talking about that. I am saying that you determine the compensation regardless of whether it goes to the Henderson-
114 ville Light & Power Company or to the other respondent or to both of them. You need not worry yourselves about that at all, that will be settled later on.

What is it the Blue Ridge Company seeks to do in this proceeding. It seeks, as you have heard read in the petition and have heard in the course of the trial, to acquire the right to take up the water out of the bed of Green River as it now runs above the land in question, and take it in a flume down on the opposite side of the river from this land to a point some distance below the land and that means, or we may assume that they ask to take the water out of the bed of Green River as it now runs in front of the 76 acres of these respondents and dry up th- river bed at that place. They are not seeking to acquire this 76 acres of land, not seeking to build anythink on it, flood it with water or anything of that sort, but are seeking to take the water away from where it runs now in the river channel, and that is what is meant by the word divert or diversion of the water in this issue. Now if they do that, what compensation should these respondents have on account of it? That is issue C, to which we are now addressing our attention.

Gentlemen of the jury, I think the most accurate definition of what this compensation allowed by you is to be, and most briefly stated is this, and the Court charges you this is the rule that will govern you in this matter when you go out to consider your verdict:

"It is the amount by which the present value of this 76 acres of land belonging to these defendants, or whichever one owns it, would be lessened by reason of the diversion of the water as this Blue Ridge Co., the petitioner seeks to do it?"

Defendants, respondents, have assumed the burden of this issue to show you by the greater weight of the evidence what this compensation should be. The compensation which the law requires is full compensation for the property or the right which is taken away from it. In estimating the value of this property the capabilities of the property and all uses to which it may be applied or for which
115 it is adapted may be considered, and not merely the condition it is in at this time and the use to which it is now applied by the owner. These defendants are entitled to recover the depreciation in the value of their property in view of any and all uses to which it is adapted. The higher Court in one case uses these expressions:

"The true measure of damages is the difference in the value of the land of the plaintiff that is effected by the flowage and ponding back of the water arising from the defendant's dam and its condition just prior to the erection of said dam." That is a case where they ponded back water on a man's property, therefore the facts are not the same but the rule is the same. The Court said it was the difference in the value of the land just before the dam was erected and the water

backed over the land and the value just after part of it was covered by water. That is the reason I read this rule to you, because the same rule applies here. "Where by compulsory means and for the public good the State invades and takes the property of citizens, the exercise of its highest prerogative in respect to property, it should pay him full compensation."

The Court here defines the market value of property, saying it is the price it will bring when offered for sale by one who desires but is not obliged to sell and when bought by one who is under no necessity of having," and repeats what I have said in estimating the values, all capabilities of the property and all uses to which it may be applied or for which it is adapted may be considered and not merely the condition it is in at the time and the use to which it is being applied by the owner.

In determining the value of land appropriated for public purposes the same conditions are to be regarded as in the sale of property by private parties. The inquiry in such cases and here must be what is the property worth in the market, viewed not merely with reference to the use or to the uses to which it is at the time applied but with reference to the uses for which it is plainly adapted. What is it worth from its availability for valuable uses, assuming it has
116 them? Property is not to be deemed worthless because the owner allows it to go to waste or be regarded as valueless because he is unable to put it to any use. Others might be able to use it.

If a tract of which part or all is taken for public use possesses special value to the owner which can be measured by money, he is entitled to have that value considered in the estimation of compensation or damages. The market value of property includes the value for any use to which it may be put. If by reason of its surroundings or its natural advantages or its intrinsic character it is particularly adapted to some particular use, all these circumstances which make up this adaptability may be shown and the fact of such adaptability may be taken into consideration in estimating compensation? The Court charges you that is the law in this case and it is your duty to so consider this rule.

I believe that the undisputed facts in this case show that this stream runs between the lands of this petitioner on the south side and the land of the respondents on the north side. It is not a navigable stream, it is a mountain stream and the respective titles of these two properties go to the middle of the stream, that is, as to the bed of the stream, the thread. When it goes to the middle of Green River, the water flows between them for the benefit of them both and they are equally interested in it so far as property rights and benefits arising to them as riparian owners go, and they are both entitled to have it flow there where God set it to flow for the benefit of them both. It is not for the purpose of this inquiry we now have that you can split that stream in two in the middle, but get in your minds that it is a stream that runs between them. If this decree of condemnation is signed by the Court, it would mean that this petitioner is given the right to take up the water out of the bed of the stream

and run it in flumes or underground down below this property. What compensation should these respondents have on account of that?

Thhe respondents, Hendersonville Light & Power Co., and
117 Saluda-Hendersonville Interurban Railway Company contend that the evidence shows that it is a valuable property and when you take the water away from it as contemplated here by the Blue Ridge Company, that it will greatly depreciate and lessen the value of this property, they say practically destroy its value. They contend that they have shown you that it lies about half a mile along the stream and that in that distance the river has a fall of 211 to 219 feet and they contend that by reason of its location, the location of the land as they have shown you they held land on their property contiguous to the stream, and everything appearing in the evidence, that you ought to find that it is a valuable property and that the compensation allowed them by you on account of the taking away of this water ought to be large, they say as much as $40,000. They say there is other evidence here of the loss they would sustain, that Mr. Oates, they contend, paid or is to pay $35,000 for the property and that the evidence shows that he offered the Blue Ridge Company $40,000 for the necessary rights and easements on the other side. A number of other contentions are given you by the respondents. I will not mention them all, they have been so ably presented to you by able counsel.

The Blue Ridge Company on the other hands says and contends that the property has no value as claimed by the respondents, that this is entirely a fictitious value you ought not to consider any such value and ought not to award anything that way in the respect of compensation. The Blue Ridge Company insists that the evidence shows that Mr. Torrence only owned it some twelve years and that he paid somewhere from three to four to seven hundred dollars for the whole tract of 76 acres, including such water powers as these respondents now have. They contend that the evidence shows that Mr. Oates only gave the other respondent, through Mr. Torrence, $1,000 for the whole property and that this trust deed for $34,000 shows upon its face that they never regarded that as the value of the property. This trust deed says if the Hendersonville Light
118 & Power Company does not pay the $34,000, that the trustee, Mr. Mauney, may sell the property and that the Saluda-Hendersonville Company is to take whatever the property brings, and that the Hendersonville Light & Power Company is in no way obligated either to take the property finally or to pay the balance of the purchase money; therefore the petitioner here contends that the deed of trust shows upon its face that the purchaser did not intend to pay and the seller never expected to receive anything like $35,000 for the property. They contend that it is out of reason that you should find it so, that property which changed hands twelve years ago or such a matter for $600 or $800 should be worth $40,000. They contend that the offer to pay $40,000 for the holdings of the Blue Ridge Company or the other side was not in good faith and that the jury ought not to consider that as a circumstance in determin-

ing this question of compensation. The Blue Ridge Company says that its holdings both below and above this place were large and that under the circumstances they could not afford to sell the other side of the stream and cut their holding in two, and they argue to you that Mr. Oates, acting for the Hendersonville Light & Power Co., knew that when he made this offer of $40,000 knew that they could not sell the other side of the stream without destroying their holdings.

The respondents say it is not true; that this offer was in good faith, that Mr. Oates acted in good faith when he made the offer to the plaintiff company.

You can consider all the evidence here, what you deem it to be worth in passing upon this question. I tell you again that you have a right to take into consideration in arriving at a verdict upon the issues submitted to you the location of the land, what it is, where it is, the size of the stream, where it lies, any fall in the lay of the land, the bed of the stream between the upper and lower lines, how the two companies own there, each to the thread of the stream, everything in this evidence which will enable you to determine how much the property will be worth less with the water taken
119 away than it is worth with the stream running along there today, and that amount will be your answer to this last issue.

I will give you the definition of market value again: "The market value of property is the price which it will bring when it is offered for sale by one who desires but is not obliged to sell it and is bought by one who is under no necessity of buying." In estimating its value, and this applies to this case,—all the capabilities of the property and all the uses to which it may be applied and to which it is adapted may be considered by you and not merely the condition it is in at the time and the use to which it is then applied by the owner. The market value of property includes its value for any use to which it may be put if by reason of its surroundings and its natural advantages or its artificial improvements or its intrinsic character it is peculiarly adapted to some particular use, all these circumstances which make up this adaptibility may be shown and the fact of such adaptibility may be taken into consideration in estimating compensation.

The question is what is its market value in view of any use to which it may be applied and all the uses to which it is adapted and that rule will govern you in arriving at a conclusion as to what compensation you will allow the defendants, respondents in this case.

The answer to this last issue is to be found and made by you in keeping with your consciences and your oath. There was something said about a former case and the Court desires to state here that a record of the former case was introduced in evidence by the petitioners and objected to by the defendants. I am inclined to think the Court overruled the objection for the present but the Court desires to state that in its finding of fact in this case that the record is excluded and the objection is sustained and so far as your consideration of this case, you will not consider it in any light whatever. The finding by the jury in a former case has nothing to do with this

case. This is a different case, different property and we know
120 nothing about the facts, circumstances and evidence entering into the former case. It is not for you to consider and discuss where the power will go after it is developed by this Blue Ridge Company, if they should develop it, if it goes to North Carolina or South Carolina, whether it may help to build up Henderson or Polk Counties is not a matter to be considered here at all. You have no favoritism to be exercised one way or the other in the determination of this issue. It is a question of value, a question of compensation. Something has been said about strangers, that has not been pressed; something has been said about some of the corporators living in South Carolina. We have no strangers in this Court House. In this Court no corporation is any stronger than the weakest individual and no weaker than the strongest. Fair dealing and even show between man and man is the primary purposes which brings you and me into this court house, and that men should have their rights adjusted without knowledge of their personality except as that personality and character in question may enter into consideration is the highest rule which could guide us in our deliberations and it is the great glory of this court. You will award to these respondents under this charge just such compensation as you find they are entitled to under the facts of this case, applying the rules of law I have given you, without the least feeling of preference on the one hand or bias or prejudice on the other, you shall reach your conclusion and that ought and shall be your verdict.

It is a question of compensation for the thing that it is to be taken away, if taken, and that compensation is based upon the value or the lessened value of the property, as the jury shall find it to be under the facts and law of this case.

When you go out to consider your verdict bring your good common sense to bear in this case, and your best judgment, and your best intelligence in considering this issue, and after doing that and discussing the evidence in the case, make your findings. As
121 the respondents must surrender this property and right what reasonable compensation shall be given them, and whatever you find that to be, reach your conclusion and that shall be your verdict.

(At the conclusion of the charge, Mr. Britt, of counsel for respondents, addressed the court as follows:)

The respondents requests the Court to instruct the jury upon the evidence, should the land of the respondents be condemned to the use of the petitioners, the entire stream of Green River would constitute a water power, and that the portion owned by the respondents would constitute a necessary and integral one-half of said water power.

The Court: I thought I had charged fully upon that. I can not say whether or not the petitioners have admitted that the entire stream at the Narrows would be a water power, or is a water power.

I take it for granted that from all the evidence you would likely find that it is a water power, and of course one half of the stream is

an integral part of the whole and it is your duty to consider what this water is adapted to. You have a right to consider all that. The water is running there, half of it the respondents have a right to use and half of it the plaintiff has a right to use. Half is a part of the whole, there can not be any question about that. Of course you take all that into consideration in arriving at your conclusion as to what damage the respondents are entitled to recover.

Judgment.

STATE OF NORTH CAROLINA,
County of Henderson:

In the Superior Court, November Term, 1914.

BLUE RIDGE INTERURBAN RAILWAY CO.
vs.
HENDERSONSVILLE LIGHT & POWER CO., and SALUDA-HENDERSONVILLE INTERURBAN RAILWAY CO.

This cause coming on to be heard upon the findings of the
122 Court and verdict of the jury:

Now, upon motion of counsel for the petitioner, Blue Ridge Interurban Railway Co., it is ordered and adjudged as follows:

It is ordered and adjudged that the rights sought to be condemned in the petition in this case that is the right to divert Green River from the lands of the respondents as set forth in the petition, be condemned to the use of the petitioner for the purpose set forth in the petition and that upon the payment into the office of the Clerk of this Court of the sum of $10,000.00 (Ten Thousand Dollars) to the use of the respondents the said petitioner may divert the said stream from the lands of the respondents, and appropriate the same to the public uses in the manner as set forth in the petition.

It is further ordered that the cost be paid by the petitioners, the same to be taxed by the Clerk.

JAS. L. WEBB,
Judge Presiding.

It is ordered by the court that a stenographer fee of $25.00 shall be taxed against the defendant in this case with the bill of cost.

"There will be only three issues submitted for your consideration, two of which the Court will instruct you later on, if you believe the evidence in this case, you will answer the first and second issues, or issues A. and B. No," and really when you go out to consider your verdict, you will only have one issue to consider, that, is the issue as to the question of damages."

The respondents except to the instructions in the charge above quoted, and this is.

Exception No. 6.

"* * * and so the Court now instructs you, if you believe all the evidence, given in this case, that it is your duty to answer
123 this issue, A, "No." The Court so instructs you that if you believe all the evidence in this case, you will answer the first issue "No."

The respondents except to the instruction in the charge above quoted, and this is

Exception No. 7.

"The same instruction which I have given in regard to the first issue, called issue A, I give you in regard to the second issue, which I will call issue B, and upon the same principles of law, and without needlessly going over them again, I instruct you as to this issue, if you believe all the evidence offered by both sides in this case, that it is your duty to answer this second issue, B, "No."

The respondents except to the instructions in the charge above quoted, and this is

Exception No. 8.

Upon the verdict returned by the jury judgment was signed by the Court, to which judgment the respondents excepted and gave notice of appeal to the Supreme Court as by law required, said judgment and notice being as set forth in the record.

To said judgment the respondents excepted and this is

Exception No. 9.

Summary of Exceptions.

The summary of the respondents' exceptions is as follows, towit:

Exception One.

That the Court refused to allow the respondents' motion for judgment as of non suit at the close of the petitioner's evidence.

124 Exception Two.

That the Court refused to allow the respondents' motion for judgment as of non suit at the close of all the evidence.

Exception Three.

That the Court refused to give the following special instructions petitioner, of which development the lands of the respondents forms

"That if the stream, Green River, in its entirety, within the land described in the petition and the land adjoining said stream on the

opposite side thereof, constitutes a water power, then one half of said stream, being an integral part of said water power, right or property, would not be subject to condemnation, and you would therefore answer the second issue "Yes."

Exception Four.

That the Court refused to give the following special -struction requested by respondents in writing and in apt time, to wit:

"That the entire stream, Green River, along the water front of respondents' land is a water power, and if the one half of said stream owned by the respondents is condemned for the use of the petitioner, then the value of said one half should be taken into consideration in estimating the amount of damages to which the respondents are entitled, as well as all the other facts and circumstances tending to show the value of the proposed water power development of the petitioner, of which development the lands of the respondents forms an integral and necessary part according to the contentions of the petitioner."

Exception Five.

That the Court refused to give the following special instructions requested by the respondents in writing and in apt time, to wit:

125 "That if the jury should find from the evidence that the stream, Green River, in its entirety, between the land described in the petition and the land of the petitioner on the opposite side of the stream, contains a water power capable of development, and that such development, when made, has a market value, then it would be the duty of the jury in estimating the compensation to be awarded the respondents for the condemnation of their lands, to consider the value of such development to which such water power may be adaptable; and if the jury should find that the respondents own one half of the water power capable of development then it would be the duty of the jury to award, as compensation to the respondents for the taking of their lands, or water rights one half of the value of such water power capable of such development.

Exception Six.

That the Court charged the jury as follows, to wit:

"There will be only three issues submitted for your consideration, two of which the Court will instruct you later on, if you believe the evidence in this case, you will answer the first and second issues, or issues A. and B., "No," and really when you go out to consider your verdict you will only have one issue to consider, that is, the issue as to the question of damages.

Exception Seven.

That the Court further charged the jury as follows, to wit:

"* * * *, and so the Court now instructs you, if you believe all

the evidence, given in this case, that it is your duty to answer this issue, A, "No." The Court so instructs you that if you believe all the evidence in this case, you will answer the first issue "No."

Exception Eight.

"That the Court further charged the jury as follows, to wit:
126 "The same instructions which I have given in regard to the first issue, called issue A, I give you in regard to the second issue which I will call issue B, and upon the same principles of law, and without needlessly going over them again I instruct you as to this issue, if you believe all the evidence offered by both sides in this case, that it is your duty to answer this second issue, B, "No."

Exception Nine.

That the Court rendered the judgment which appears in the record.

Appellants' Assignment of Error.

The appellants assign error as follows:

1. That the court erred in refusing to grant respondents' motion for judgment as of non suit at the close of petitioner's evidence.
2. That the Court erred in refusing to grant respondents' motion for judgment as of non suit at the close of all the evidence.
3. That the Court erred in refusing to give respondents' first prayer for special instructions as set forth in appellants' Exception Three.
4. That the Court erred in refusing to give respondents' second prayer for special instructions as set forth in appellants' Exception Four.
5. That the Court erred in refusing to give respondents' third prayer for special instructions as set forth in appellants' Exception Five.
6. That the Court erred in charging and instructing the jury as set forth in appellants' Exception Six.
7. That the Court erred in charging and instructing the jury as set forth in appellants' Exception Seven.
127 8. That the Court erred in charging and instructing the jury as set forth in appellants' Exception Eight.
9. That the court erred in rendering the judgment set forth in the record.

The respondents tender the foregoing, together with the summons, petition, answer, issues, questions of fact answered by the Court, judgment, notice of appeal and return thereon, and appeal and prosecution bond, as the case on Appeal to the Supreme Court.

STATON & RECTOR,
MICHAEL SCHENCK,
BRITT & TOMS,
Attorneys for Respondents.

Received the foregoing Statement of Case on Appeal, this, the 15th day of December, A. D., 1914, and served same on the 15th day of December, A. D., 1914, by delivering a copy thereof to Smith and Shipman, attorneys, for the petitioner, appellee, the Blue Ridge Interurban Railway Company.

J. C. DRAKE,
Sheriff of Henderson County.

By Allard Case, Deputy Sheriff Henderson County.
60c. paid by R. M. Oates.

Notice of Appeal to Supreme Court.

STATE OF NORTH CAROLINA,
County of Henderson:

In the Superior Court, November Term, 1914.

BLUE RIDGE INTERURBAN RAILWAY CO.
vs.
HENDERSONVILLE LIGHT AND POWER CO. and SALUDA-HENDERSONVILLE INTERURBAN RAILWAY CO.

To the Blue Ridge Interurban Railway Co., plaintiff in the above entitled action:

This is to notify you that the defendants, the Hendersonville Light & Power Co., and the Saluda-Hendersonville Interurban Railway Co., in the above entitled action appeal to the Supreme Court of North Carolina from the judgment rendered against them
128 in said action in Superior Court of Henderson County on Saturday, the 21st day of November, A. D. 1914.

STATON AND RECTOR,
BRITT & TOMS,
MICHAEL SCHENCK,
Attorneys for the Defendants.

Received December 1st, 1914; served December 1st, 1914, by delivering a copy of the foregoing notice to Smith & Shipman, Attorneys for the plaintiff and by reading said notice to said attorneys.

J. C. DRAKE,
Sheriff of Henderson County,
By J. E. DOTSON,
Deputy Sheriff Henderson County.

Appeal Bond.

STATE OF NORTH CAROLINA,
County of Henderson:

In Superior Court, November Term, 1914.

BLUE RIDGE INTERURBAN RAILWAY CO.
VS.
HENDERSONVILLE LIGHT & POWER COMPANY and SALUDA-HENDERSONVILLE INTERURBAN RAILWAY COMPANY.

Whereas, at the November Term 1914 of the Superior Court of Henderson County in the above entitled case, Blue Ridge Interurban Railway Company obtained judgment against Hendersonville Light & Power Company and Saluda-Hendersonville Interurban Railway Company, and whereas said defendants have appealed from said judgment to the Supreme Court.

Now therefore, we Hendersonville Light & Power Company and Saluda-Hendersonville Interurban Railway Company, principals, and K. G. Morris, Surety, undertake, pursuant to the Statute, that the said appellants will pay all costs which may be awarded against them by such appeal, not to exceed Fifty Dollars ($50.00).

This 13th day of March, 1915.

HENDERSONVILLE LIGHT & POWER COMPANY,
By R. M. OATES, *President.*
129 SALUDA-HENDERSONVILLE INTERURBAN RY. CO.,
By STATON & RECTOR, *Attorneys.*
K. G. MORRIS.

K. G. Morris, above named, being duly sworn says that he is a resident and free-holder in the State of North Carolina and worth double the sum above specified in the undertaking over and above all his debts, liability and exemption from execution.

K. G. MORRIS.

Sworn to and subscribed before me this 13th day of March 1915.

J. MACK RHODES, [SEAL.]
Notary Public.

My Commission expires Jan. 24, 1917.

Clerk's Certificate.

STATE OF NORTH CAROLINA,
County of Henderson:

In the Superior Court.

BLUE RID-E INTERURBAN RAILWAY CO.
vs.
HENDERSONVILLE LIGHT & POWER CO. and SALUDA-HENDERSONVILLE RAILWAY COMPANY.

I, C. M. Pace, Clerk of Superior Court of Henderson County, do hereby certify that the foregoing is a correct transcript of the Record of the Proceedings in the above entitled cause, as appears from the records, files and papers in my office.
This — day of March, 1915.

———— ————,
Clerk Superior Court, Henderson County.

130 *Docket Entries.*

Appeal docketed March 24th, 115. Argued May 4th, 1915. Held under advisari. Opinion filed by Clark, C. J., for the Court September 22nd, 1915 and concurring opinions filed by Brown, Hoke and Allen, JJJ. as follows:

131 Appeal from Superior Court, Henderson County. Webb, Judge.

Action by the Blue Ridge Interurban Railway Company against the Hendersonville Light & Power Company and the Saluda Interurban Railway Company. From a judgment for plaintiff, defendants appeal. Error.

Staton & Rector, of Hendersonville, Charles French Toms, of Asheville, J. W. Keerans, of Charlotte, and Michael Schenck, of Hendersonville, for appellants.
Smith & Shipman, of Hendersonville, and Tillett & Guthrie, of Charlotte, for appellee.

CLARK, *C. J.:*

This is a proceeding by the plaintiff to condemn the one-half interest of the defendants in the water power in question. It is admitted that the line between the two runs to the middle of the stream; the plaintiff owning one-half of the bed of the stream on the south side, and the defendants owning the half of the bed of the stream on the north side, for half a mile. It was suggested for the plaintiff

in the outset of the argument that this was not a water power. If so, certainly the plaintiff has no right to condemn it, for it is not seeking to take the bed of the stream, nor the water as a right of way. Besides, the complaint alleges that plaintiff needs it for the water power. Neither can we give any weight to the suggestion that the interest of the defendants in this water power is too evanescent and intangible for it to object to the plaintiff taking it away, for the plaintiff admits that it offered $1,000 for the defendants' interest and that it refused an offer from the defendants of $40,000 for its own interest in the power. Indeed, the jury say the value of defendants' share in the water power is $10,000, and the plaintiff is seeking to force the defendants to take that sum for its interest.

This is too serious a matter and too important to be minimized. In view of the not distant exhaustion of the coal measures of the country, these sources of heat, and already almost the sole source of artificial lighting, are a matter of the gravest concern to government and people. The effort of this plaintiff to take this property of the defendants was settled in the litigation between these same parties (Railroad v. Oates, 164 N. C. 169, 80 S. E. 398), and this is practically an attempt to reverse that decision by a fresh appeal. It may be observed that, if the plaintiff could take the defendants' interest in this proceeding, there is no conceivable reason why the defendants are not equally entitled to take the plaintiff's interest.

The defendant Light & Power Company was chartered in 1904 to supply light and power to the people of Hendersonville and surrounding country. Its power plants consist of No. 1, developed in 1904, No. 2, completed in 1914, and this power, which it avers and puts in evidence that it bought and holds for development and use as a necessary auxiliary to its other two powers, having purchased this power for that purpose. Its tract on the north side of this place, called "The Narrows" on Green river, extends for half a mile, with a fall of 218 feet through which the water pours with great velocity, capable of furnishing water power of perhaps 2,700 horse power though the witnesses naturally vary in their estimate. The plaintiff company was organized in South Carolina and as a manufacturing company; but, finding it could not condemn water power in North Carolina unless it was a corporation of this state, and under the act of 1907 an interurban railroad also, it later took out incorporation here as an "Interurban Railway."

The public policy of a state is defined by its Legislature. Probably the most feared combination to be guarded against is the acquisition of the water powers of the country by one or more great aggregations of capital, which, in view of the certainty of the exhaustion of our coal measures at no distant date, will give such monopolies the full control of light, heating, and power, and with them domination over the very means of existence of the public. With that view, the General Assembly of this state, in conferring the power of condemnation on telephones and electric light and power companies by chapter 74, Laws 1907, inserted a proviso:

132 "Water powers, developed or undeveloped, with the necessary land adjacent thereto for their development, shall not be taken."

To meet this provision, the influences behind these great aggregations of capital were powerful enough, it seems, to procure later at that session the enactment of chapter 302, Laws 1907, which authorizes street and interurban railway companies, "whenever such company shall not own the entire water front, or all of the lands, water rights or other easements necessary to be used in fully developing such water power," with further provision that, if the company could not agree with the owner for the purchase of such lands, water rights, and other easements, the same might be condemned in the manner provided for railroads. The adroit purpose of this alternative probably passed unperceived. When this same matter was here between these same parties (Railroad v. Oates, 164 N. C. at page 169, 80 S. E. at page 399), the court said:

"It would therefore seem that if a company needed a water power to produce electric power, and styled itself an electric and power company, it could not condemn the water power of another for that purpose. Chapter 74, Laws 1907. But if it styled itself 'a street and interurban railway company,' and should 'own land on one or both sides of a stream which can be used in developing water power,' it might have condemned the additional lands 'needed to fully develop such water power.'" Chapter 302, Laws 1907.

In Power Co. v. Whitney, 150 N. C. 34 [63 S. E. 188] it was held that water powers could not be condemned in this state, it being against our public policy as declared by chapter 74, Laws 1907. While matters were in this state, the Legislature enacted chapter 94, Laws 1913, which was entitled "An act to amend chapter 302, Public Laws of 1907, relating to the right of eminent domain." The amendment consisted in the addition to the said chapter 302, Laws 1907, of the following words:

"Provided, further, that such company or companies shall not have the power to condemn any water power, right or property of any person, firm or corporation engaged in the actual service of the general public, where such power, right or property is being used or held to be used or to be developed for use in connection with or addition to any power actually used by such persons, firms or corporations serving the general public."

It appearing in that case, as it does in this, that this particular property was held to be used and developed in connection with and in addition to the power actually used by the defendant Light & Power Company in supplying electric light and power to Hendersonville and surrounding country, this court held that judgment should have been entered for the defendants.

In this new proceeding the plaintiff seeks to evade that decision by setting up the plea that the defendants cannot use or develop one-half interest in said water power, and therefore the plaintiff is entitled to condemn the same and take the whole of it for its own use. If this were true, the defendants would have equal right to condemn the plaintiff's half interest in the property for their own use, the more especially as the plaintiff offered the defendants only $1,000 for their half interest, and the defendants offered the plaintiff $40,-

000 for its half interest, which the plaintiff admits that it declined. In Railroad v. Oates, 164 N. C. at page 172, 80 S. E. at page 400, the court said as to this identical property:

"The matter turns, therefore, on the question whether upon the terms of chapter 94, Laws 1913, the land in question is subject to condemnation."

And the court further held that it could not be condemned if it was "held to be used, or to be developed for use, in connection with or in addition to any power actually used."

[1] On this trial the court submitted the following two issues to the jury:

(1) Are the water powers, rights, and properties on the land of the respondents, as described in the petition, capable of being developed for the production of electric power for use in connection with and in addition to the electric power already developed and in use by the respondent Hendersonville Light & Power Company?

(2) Are the water powers, rights, or properties on the land of the respondents as described in the petition being held by the respondent Hendersonville Light & Power Company to be used and to be developed for use in connection with or in addition to any power now actually used by the said respondent Hendersonville Light & Power Company?

There was much, and conflicting, evidence on these propositions, and the defendants were certainly entitled to have these issues submitted to the jury. The defendants could not be deprived of their property without due process of law and according to the law of the land. They had the right to have these issues of fact found by a jury, and upon such findings the court should have imposed judgment of law, subject to review on appeal. The court, however, withdrew this right from these defendants and directed the jury to answer both issues against them.

The defendants offered full evidence that the water could be divided by a dam extending half way across the stream, then up the middle of the stream. It is a self-evident proposition, not requiring evidence, that such a dam would ordinarly allow more water to go down the plaintiff's side, as that would be without an obstruction, while on the defendants' side the water might be ponded back. But in a stream like this, falling 218 feet in half a mile, such a dam would accurately divide the water, provided the stream is the same depth all the way across, and, if not, a mathematical calculation would regulate the location of the dam to make an even division.

This is not a navigable stream, and the defendants, owning 132½ to the bed of the stream, could build a dam all the way up on their line. To do so would throw no water on the plaintiff's side and take none from it. Neither would there be this effect, if the defendants built their wing dam on their line only part the way. Above the commencement of the wing dam and below its end the water would be unaffected. For the space of the wing dam the cross dam to its lower end would pond the water on the defendants' side, but would in no wise affect its height, either by

raising or lowering it on the plaintiff's side. The defendants do not propose to take one drop of water out of the stream, but merely to take out of it that intangible, invisible, imperceptible power known as the force of gravity, which by turbine wheels or otherwise will generate the electricity which will run their street cars, electric lights, and heating in the town of Hendersonville, and will enable them to execute their contracts.

This division of the water of a stream by wing dams, without in any wise lowering or raising the water in the plaintiff's half of the stream, is a matter of common knowledge. In the evidence in this case the witness Seaver tells of two such developments near Waynesville in this state. The witness Sherrer also tells of a similar development in Daldwell county. Both of these witnesses were experienced engineers, and found by the court to be experts. In the "Official Electrical Directory of the United States" there are named many "wing dam developments" of the water power in one-half of the stream, among them the famous Keokuk plant, on the Mississippi, at Keokuk, Iowa, developing in this manner 200,000 horse power. Another is at McCall's Ferry, on the Susquehanna river, which furnished all the power for Baltimore, Md. At Minneapolis, Minn., is the similar well-known development of power on either side of the river for Minneapolis and St. Paul. Another is at St. Croix, Wis., where half the power is on the Minnesota side and the other half on the Wisconsin side. Likewise there is a similar development at International Falls, Minn., where the Canada half is operated on the Ontario side and the other half in Minnesota. The most striking instance, however, is the development of water power on both banks of the Niagara river.

The defendants offered evidence that their offer of $40,000 for the plaintiff's half was bona fide, and that they wished to use the entire 2,700 horse power if the plaintiff would sell, and if it would not that they needed the 1,360 horse power on their own side as an absolute necessity to enable them to carry out the contracts already made, for which their other plants were insufficient, unless they had the aid of their half interest in this power. In the case of Power Co. v. Navigation Co., 152 N. C. 472, 68 S. E. 190, the objection was made by the lower proprietor against the upper proprietor on the same side that the water was diverted out of the stream by a canal which carried the water behind the lower proprietor's mill and emptied into the river several miles below, thus, as the lower proprietor claimed, reducing the quantity of water which should be utilized for running his own mill lower down on the same side with the defendants' intake.

Here the plaintiff and defendants are opposite owners, and the defendants are only seeking to place a dam on their line in the middle of the stream, curving back to the bank, by which they will not take any water out of the stream, but will take the half which comes down their side of the dividing line, conduct it by a flume to the turbines, which will take out the intangible force that by means of the turbine will generate electricity, thus leaving the water on the plaintiff's side of the stream at no time higher or lower than it would

be without the dam on the dividing line. The plaintiff contends that this cannot be done. The defendants offered evidence that it could be, giving the opinion of expert engineers, who testified as to many places in which this was being done. The matter should have been submitted to the jury as an issue of fact.

The defendants, as riparian owners on one side of the stream, had the right to make a reasonable use of the water on their side, either for domestic or manufacturing purposes, and whether their proposed use would be unreasonable was a question for the jury to determine under all the facts and circumstances. If the jury should find, upon the evidence, that the defendants' half of the water power could be used, as they propose, to generate electricity without building entirely across the stream, then this water power was specifically exempt from condemnation by chapter 94, Laws 1913. It was so held in the litigation between these same parties in Railroad v. Oates, 164 N. C. 170, 80 S. E. 398.

The question whether the use made by the riparian owner of the water of a stream upon its own riparian land is a reasonable use is one of fact, and not of law. Prentice v. Geiger, 74 N. Y. 341; Bullard v. Manufacturing Co., 77 N. Y. 525; Gould on Waters, § 220; Dumont v. Kellogg, 29 Mich. 420, 18 Am. Rep. 102; Hayes v. Waldron, 44 N. H. 580, 84 Am. Dec. 105; Merrifield v. Worcester, 110 Mass. 216, 14 Am. Rep. 592; Ulbricht v. Water Co., 86 Ala. 587, 6 South. 78, 4 L. R. A. 572, 11 Am. St. Rep. 72. A riparian owner may temporarily retain water by dams in order to furnish power to run machinery, when the amount is reasonable. Pierson v. Speyer, 178 N. Y. 270, 70 N. E. 799, 102 Am. St. Rep. 499. And there are very numerous other cases with which the books are filled.

The defendants asked the court to charge:

"If the stream, Green river, in its entirety within the land described in the petition and the land adjoining said stream on
133 the opposite side thereof, constituted a water power, then one-half of said stream, being an integral part of said water power right or property, would not be subject to condemnation, and you will answer the second issue, 'Yes.'"

Under chapter 94, Laws 1913, and the decision in Railroad v. Oates, 164 N. C. 167, 80 S. E. 398, it was error not to give this instruction. In any aspect it was error for the court to take the issue from the jury and to answer it himself.

The defendants further requested the court to charge:

"The entire stream, Green river, along the water front of the respondents' land, is a water power, and if the one-half of said stream owned by the defendants is condemned for the use of the plaintiff, then the value of said one-half should be taken into consideration in estimating the amount of damages to which the defendants are entitled, as well as all the other facts and circumstances tending to show the value of the proposed water power development of the plaintiff, of which development the lands of the respondents

form an integral and necessary part, according to the contentions of the plaintiff."

If the plaintiff had been legally entitled to condemn the water power of the defendants at all, this prayer should have been given. The court, however, refused to so charge, and instructed in lieu thereof that:

"The defendants would only be entitled to the present value of their 76 acres of land, lessened by reason of the diversion of the water which the plaintiff seeks to take."

—saying in effect in his charge that the defendants were not entitled to the value of the water power which was to be taken from them by the "strong arm," but they were only entitled to the diminution in the value of their land by the plaintiff's taking one-half of the water from the stream.

The result of this charge is practically shown by the fact that, though the defendants had offered the plaintiff $40,000 for its half interest in the water power, and the plaintiff admitted on the stand that it had declined that offer and would not take it, the jury assessed the value of the defendants' damages by reason of its half being taken from them by the plaintiff at $10,000, a patent loss of at least $30,000, and according to their evidence very much more damage was inflicted upon these defendants.

The defendants also requested the court to charge:

"If the jury should find from the evidence that the stream, Green river, in its entirety between the land described in the petition and the land of the petitioner on the opposite side of the stream, contains a water power capable of development, and that such development, when made, has a market value, then it would be the duty of the jury, in estimating the compensation to be awarded the defendants for the condemnation for their lands, to consider the value of such development to which such water power may be adaptable; and if the jury should find that the respondents owned one-half of the water power capable of development, then it would be the duty of the jury to award as compensation to the defendants for the taking of their land or water rights one-half the value of such water power capable of such development."

This proposition is so clear that no argument should be required. The defendants were certainly entitled to the value of the property which was taken from them, and under certain circumstances they were entitled to more than the above measure, because if, as their testimony shows, this water power was necessary to enable them to execute the contracts which they had taken, or proposed to take, in furnishing light and power, the loss of this power might inflict a much greater loss upon them by reason of the disability thus inflicted upon them, for it may well be that there is no other water power of ready access which they can acquire for their purposes at the same price.

The right of the defendants to the use of the water along their

frontage, provided only they returned the water to the stream in undiminished quantity before it reaches the next lower proprietor, is fully recognized in the very full discussion by Walker, J., in Power Co. v. Navigation Co., 152 N. C. 472, 68 S. E. 190, and that is all the defendants propose. They will not divert the water itself out of the stream beyond their lower line. They will merely transmit the power generated by the weight of falling water over cables to their other plants, but the water itself will pass on in undiminished volume. If not, it will be for the lower proprietor to complain. The plaintiff, the opposite proprietor, cannot object, so long as the defendants do not use in generating power more than half the water. This is not a navigable stream.

The defendant the Hendersonville Light & Power Company is engaged in serving the general public and holds its half interest in this property for development in connection with its other plants. In the former case between these parties (164 N. C. 167, 80 S. E. 398) this court told this plaintiff that it could not take this property from the defendants, except with their consent by purchase. It can make no difference that the defendants own only one-half of the power, instead of the whole. The plaintiff could not condemn one-half of a graveyard, or half a dwelling house, because it or some one else owned the other half; and for a stronger reason, because it is against public policy, the plaintiff cannot take the defendants' half of this water power, especially when it has refused to sell its own half to the defendants at four times the price for which it seeks to make the defendants yield their half.

Upon the face of the complaint the plaintiff is endeavoring to take the property of the defendants and devote it for their own benefit to the very same purpose for which the defendants are holding it; i. e. for the development of a water power for public use. This cannot be done. 2 Lewis Em. Dom. (3d Ed.) —.

133½ In refusing to submit the issues to the jury there was error.

BROWN, *J.* (concurring in result):

All the evidence in this record is to the effect that the property sought to be condemned by plaintiff is a water power owned jointly by plaintiff and defendant as opposite riparian owners. I do not think the water can be legally divided, except by mutual consent of both owners, as that would be to greatly diminish the value of the power as a whole. In this respect I think the law is correctly stated in the concurring opinion of Mr. Justice Allen. It may be that in the case of very large and powerful streams, such as the Mississippi, the Niagara, and others, and under the authority of special local statutes, such division and diversion of the water may be both practicable and legal. But no such conditions exist here.

I concur in the judgment of the court submitting a proper issue to the jury to determine the fact as to whether the defendant is using or holding this water power to be used or developed for use in connection with or addition to any power actually used by it. An examination of the authorities convinces me that the opposite

riparian owner cannot be permitted to build a dam to the middle of the stream and divert the water through a flume, to the injury of the opposite riparian owner. If the water can be utilized in no other way, then it is not such water power that under the statute is not subject to condemnation.

HOKE, *J.* (concurring):

Our statute, in permitting water powers to be condemned for public use, withdraws from the effect of the law any water power "which is being used or held to be used or to be developed for use in connection with or in addition to any power actually being used for public service," etc. There is evidence in the record tending to show that defendant is the riparian owner of land on one side of Green river where there is a considerable fall in the stream, giving promise of a good water power, if property developed. The officials of the company testify further that defendant purchased and now holds this property with a view to aid their power already developed and now being used under a charter for the benefit of the public; that they have great need of such undeveloped power and propose to utilize the same as contemplated and provided by the statute. Whether they can carry out their purpose and utilize this power in substantial aid of the power already developed and without unwarranted interference with the rights of plaintiffs, who own along the opposite bank, is, in my opinion, a mixed question of law and fact, and, on the record, requires that the issue be submitted to the jury.

ALLEN, *J.* (concurring in result):

The water right of property of the defendant, as riparian owner, is subject to condemnation, unless it is "being used or held to be used or to be developed for use in connection with or addition to any power actually used by" the defendant, within the meaning of the proviso to chapter 302, Laws of 1907, as amended by chapter 94, Laws of 1913 (being section 2574*d* of Gregory's Supplement), and I doubt if there is any evidence of this fact; but as the other members of the court are of a contrary opinion, and no legal principle is involved in this question, I concur in the judgment ordering a new trial. I do not think the defendant has any property in the water in the stream, and that it is only entitled to a reasonable use of it as it passes his land, which may include the use for manufacturing purposes.

[2] The defendant has no right, in my opinion, to build a dam to the middle of the stream and divert half the water through a flume, although he may return it into the stream one-half mile below, before it leaves his land; and if this is the only way the water can be utilized, it is not a water right or property which cannot be condemned under the statute. The common law determines, with us, the rights of riparian owners in a stream of water flowing through their lands, and the controlling principles are, I think, correctly stated in Angell on Water Courses, §100, as follows:

"Whenever a water course divides two estates, the riparian owner of neither can lawfully carry off any part of the water without the consent of the other opposite; and each riparian owner is entitled, not to half, or other proportion, of the water, but to the whole bulk of the stream, undivided and indivisible, or per my et per tout. To use the language of Platt, J., in Vandenburgh v. Van Bergen, 13 Johns. 217, in New York: 'The grant of an undivided share in a stream would not authorize the grantee to appropriate or modify the stream to the injury of others who have a joint interest in it. The property in a stream of water is indivisible. The joint proprietors must use it as an entire stream in its natural channel; a severance would destroy the rights of all. In Blanchard v. Baker, in Maine, the defendants, who had their dam on the side of the stream opposite to the plaintiff's dam, contended that they had a good and legal right to one-half of the water in the main stream, and to carry it off by deepening an ancient outlet or canal. * * * It was held that the defendants had not a right to one-half of the water in the main stream of the river, so as to abstract it by means of the channel in question. The court said, in reply to the suggestion, that the owners of the dam on the eastern side of the river had a right to half the water, and to divert to that extent: 'It has been seen that, if they had been the owners on both sides, they had no right to divert the water, without again returning it to its original channel. Besides, it was impossible, in the nature of things, that they could take it from their side only; an equal portion from the plaintiff's side must have been mingled with all that was diverted."

The following authorities support the text: Pugh v. Wheeler, 19 N. C. 50; Durham v. Cotton Mills, 141 N. C. 624, 54 S. E. 134 453, 7 L. R. A. (N. S.) 321; Harris v. Railway Co., 153 N. C. 544, 69 S. E. 623, 31 L. R. A. (N. S.) 543, 138 Am. St. Rep. 686; Webb v. Portland Mfg. Co., 3 Sumn. 200, Fed. Cas. No. 17,322; Plumleigh v. Dawson, 1 Gilman (6 Ill.) 550, 41 Am. Dec. 199; Parker v. Griswold, 17 Conn. 300, 42 Am. Dec. 739; Carpenter v. Gold, 88 Va. 553, 14 S. E. 329; Vandenburgh v. Van Bergen, 13 Johns. (N. Y. 217; Blanchard v. Baker, 8 Greenl. (8 Me.) 266, 23 Am. Dec. 504; Davis v. Getchell, 50 Me. 602, 79 Am. Dec. 636; Newhall v. Ireson, 8 Cush. (Mass.) 595, 54 Am. Dec. 790; Farnham on Waters, vol. 2, §464 et seq; Gould on Waters, §204 et seq.

The language in the statute, "held to be used or to be developed," means more than a mere mental operation, and at least conveys the idea of capacity for use or development. I do not attach any importance to the proposition of the defendant to pay the plaintiff $40,000 for its water right on the opposite side of the stream, conceding it to have been made in good faith, because it has no bearing on the legal questions involved, and on the record is much like offering to buy the middle link in a chain without purchasing the chain.

Walker, J., concurs in the opinion of Allen, J.

135 *Docket Entries Continued.*

Petition of plaintiff to rehear docketed October 30th. 1915. Case submitted under the Rule November 19th. 1915 held under advisari.

Opinions by Brown, J. for the Court and dissenting opinions by Clark, C. J., and Hoke, J. and concurring opinion by Allen, J. filed March 22nd. 1916 as follows:

136 Appeal from Superior Court, Henderson County, Webb, Judge.

On petition for rehearing. Petition allowed, and no error found.

For former opinion, see 169 N. C. 471, 86 S. E. 296.

Upon the trial the court submitted these issues to the jury, and instructed the jury to answer issues A and B "No":

"(A) Are there water powers, rights, and properties on the lands of the respondents as described in the petition capable of being developed for the production of electric power for use in connection with and in addition to the electric power already developed and in use by the respondent Hendersonville Light & Power Company?

Answer: No.

"(B) Are there water powers, rights, or properties on the lands of the respondents as described in the petition which are being held by the respondent Hendersonville Light & Power Company to be used or to be developed for use in connection with or in addition to any power now actually used by the said respondent Hendersonville Light & Power Company?

Answer: No.

(C) What compensation are defendants, or either of them, entitled to recover for the acquirement by condemnation by the petitioners of the right to divert the water in the manner set forth in the petition?

Answer: Ten thousand Dollars ($10,000)."

Manning & Kitchin, of Raleigh, Smith & Shipman, of Hendersonville, and Tillet & Guthrie, of Charlotte, for plaintiff.

Staton & Rector and Michael Schenck, both of Hendersonville, C. F. Toms, of Asheville, and J. W. Keerans, of Charlotte, for defendants.

137 BROWN, *J.*:

[1] This case is reported in 169 N. C. 471, 86 S. E. 296. It is a condemnation proceeding brought by the plaintiff to condemn certain property called a water power belonging to the defendant. The defendant owns the land on one side of the stream and an undivided half interest in the water power. The plaintiff owns the land on the other side of the stream and a half interest in the water power. All water powers are as much subject to condemnation as any other property, unless it is established that they are "being used or held to be used or to be developed for use in connection with or addition to any power actually used by such persons, firms, or corporations serving the general public." If this is not the correct principle to

be applied to the facts in this record, the statute conferring the right to condemn water rights is a dead letter, and such rights or power cannot be condemned by the terms of the statute. If we go further and hold that, although not so used as specified in the statute, the owner may divert the water and convert it into such a water power, there is nothing left for the statute to operate upon. There are few, if any, streams in North Carolina the waters of which cannot be so diverted and developed into a water power.

[2] The effect of this proviso in the statute (Laws 1907, c. 302, as amended, chapter 94, Laws 1913 [Gregory's Supp. § 2575*d*]) is to place the burden of proof upon the owner of the water power sought to be condemned to introduce evidence sufficient to be submitted to a jury that will bring the property within the exception made by the above-quoted proviso. If the owner fails, then the property is subject to condemnation. If the owner offers sufficient competent evidence, it is the duty of the judge to submit the proper issue to the jury.

[3, 4] It is earnestly contended upon the rehearing that the defendant has failed to offer any sufficient evidence tending to prove that its half interest in this water power can be developed in any practicable way consistent with well-established principles of law for use in connection with or addition to any power actually in use by defendant. That is the only proposition presented upon this rehearing. In his opinion Mr. Justice Allen doubts if there is any evidence in the record sufficient to go to the jury tending to bring the defendant's half interest in the water power within the exception exempting it from condemnation. Further examination of the case compels the majority of the court to the conclusion that there is no such evidence.

We now conclude that all the evidence, taken in its most favorable light for defendant, discloses that the only feasible method by which the defendant can develop this water power for use is to construct a dam to the middle of the stream and divert half the water through a flume on its own side of the river. This is the only practicable method pointed out by the evidence, and to develop it in that manner would violate a well settled principle of law.

A majority of this court held on the former hearing that:

"Where a stream passes between the lands of opposite riparian owners, one of such owners cannot build a dam to the middle of the stream and divert half the water through a flume, although he may return it into the stream before it leaves his land, since in such case each riparian owner is entitled to the whole bulk of the stream, undivided and indivisible." 169 N. C. 471, 86 S. E. 296.

That this conclusion is sustained by the overwhelming weight of authority is demonstrated in the opinion of Mr. Justice Allen in this case, concurred in by Mr. Justice Walker and the writer. For additional supporting authority, see Waters & Water Courses, Cent. Dig. § 72; Dec. Dig. † 80. A re-examination of the evidence shows only one plan of development proposed by defendant. Mr. Oates, the president and general manager of defendant, testified that he

had made plans and calculations to develop his side of the Narrows. He further says:

"Owing to my ownership only to the middle of the stream, my plan was to take out half of the water by means of a diverting dam, and convey it on the north bank to the mouth of Pulliam's creek, utilize it through my water wheels, and turn it back into the river on my own land. I had several estimates made as to the cost of that development, and have had it surveyed and worked out by several engineers. The first was Mr. Chas. E. Waddell."

The witness was asked the specific question:

"Tell us your plans for the development of the Narrows, and how you expect to do it, the cost of it, what profit there will be in it."

To this he responded:

"It simply involves the use of a diverting dam. It is merely a projecting wall built into the stream to divert half the water of Green river into a canal or race which we will use for a certain distance to a settling basin where we can accumulate water and acquire a static head, and then convey the water by means of a steel flume to wheels in the power house situated at the mouth of Pulliam's creek, and the power applied and transmitted."

Upon cross-examination he was asked as to the effect of taking half of the water, and he replied:

"The other half will be left in the stream, and he can get it if he wants it. I will give him permission to go over and get it. They could not do it without my permission and without going on my lands."

Witness Shearer, hydraulic engineer, testified for defendant:

"I made an examination of the stream with a view of determining whether it is practicable for the owner of the north bank to divert one-half the stream from the channel, use it for developing water power, and return to the stream on the same land. As an engineering proposition, approximately one-half the volume of the water of that stream can be diverted to the Torrence side and devel-
138 oped into a water power and returned. At or near the head of the Torrence tract I would begin a canal, ditch, or open earth flume around the side of the hill. Would extend the mouth of the ditch into the stream at this point and carry this water around on the Torrence property to a point probably 200 to 300 feet downstream; form a little basin; carry it from there by a pipe, flume, or other method to the power house."

None of the witnesses examined proposed any plan of development except the plan set out in the testimony of Oates and Shearer. After a critical examination of all the evidence, we are unable to find a single suggestion for developing and using the defendants' half of this water power except that which contemplates taking one-half the water out of the stream.

His honor instructed the jury that the burden of proof was on the defendants to show by the greater weight of evidence that this water power was capable of being developed for use in connection with the power now used by defendants, and further instructed the jury that

upon all the evidence, if believed, to answer issues A and B "No." Applying the principles laid down in this opinion, we think the charge should be approved.

The issue as to damages was fairly submitted to the jury in a full and clear charge, of which the defendants have no right to complain. The petition to rehear is allowed, and upon such rehearing we find in the trial as had in the superior court no error. All the costs of this court will be taxed against defendants.

ALLEN, J. (concurring):

I have carefully examined the record in this appeal several times, and I do not find a line in it which would warrant the charge that the plaintiff is a trust or that it is owned by the Southern Power Company or by the Dukes, but, if these facts appeared, they would not justify us in denying to it the recognition of its property rights. The only place where the word "Duke" appears is on page 22 of the record, where John A. Law, a witness for the plaintiff, said on cross-examination:

"I am a banker, cotton mill manufacturer, and a director in one railroad, the Piedmont & Northern. The same interests own controlling stock in that and the Southern Power Company. Never heard this railroad called the Southern Power Company Road; have heard it called the Duke Road. I think he is president."

That this refers to the Piedmont & Northern I think clearly appears from page 23 of the record, where the directors of the plaintiff company are named, among which the name of Duke does not appear and from page 54 of the record, where W. S. Montgomery testifies that he is president of the plaintiff company. If, however, the plaintiff is a trust, the fault is with the General Assembly of this state, which granted to it its charter and from whom it derives all of its powers. It is not claimed that these powers have been exceeded, and, if this could be shown, it ought to be pointed out in order that the state may take steps to have the charter forfeited.

There is but one question in this appeal, and that is whether the defendant has offered evidence tending to prove that its water power and water right, which the plaintiff seeks to condemn, is not the subject of condemnation. If the defendant has offered evidence tending to prove this fact, it is entitled to have it considered by a jury; but, if not, it was the duty of the judge to so hold as matter of law.

The right of this plaintiff to condemn water rights and water powers is clearly recognized in an opinion by the Chief Justice between the same parties in Railroad v. Oates and Light & Power Company, 164 N. C. 172, 80 S. E. 398, and repeated in 169 N. C. 474, 86 S. E. 297, where he says:

"In Railroad v. Oates, 164 N. C. at page 172 [80 S. E. at page 400], the court said, as to condemning water power, 'The matter turns, therefore, on the question whether under the terms of chapter

94, Laws 1913, the land in question is subject to condemnation,' and the court further held that it could not be condemned if it was 'held to be used or to be developed for use in connection with or in addition to any power actually used.' "

This cannot mean anything except that the plaintiff can condemn the water right or water power of the defendant unless the defendant proves that the water right or water power was "held to be used or to be developed for use in connection with or in addition to any power actually used." This is the issue between the parties, and the point of difference is whether the defendant has offered evidence that its water power was "held to be used or to be developed for use in connection with or in addition to any power actually used."

As pointed out in the opinion of Associate Justice Brown, where the evidence is quoted, the defendant did not claim that its water power could be so used or developed except by running a dam to the middle of the stream and by diverting one-half the stream and conducting it one-half mile through its own land before its return to the stream, and in the opinion of the court this is not permissible; the court having adopted as the correct rule determining the right in non-navigable water of opposite riparian owners the one laid down by Angell on Water Courses, § 100, as follows:

"Whenever a water course divides two estates, the riparian owner of neither can lawfully carry off any part without the consent of the other opposite; and each riparian owner is entitled, not to half, or other portion, of the water, but to the whole bulk of the stream, undivided and undivisible, or per my et per tout. To use the language of Platt, J., in Vandenburgh v. Van Bergen [13 Johns. (N. Y.) 217], in New York: * * * 'The grant of an undivided share in a stream * * * would not authorize the grantee to appropriate or modify the stream to the injury of others, who have a joint interest in it. The property in a stream of water is indivisible. The joint proprietors must use it as an entire stream, in its 138½ natural channel. A severance would destroy the rights of al.' In Blanchard v. Baker [8 Greenl. (Me.) 270, 23 Am. Dec. 504] in Maine, the defendants, who had their dam on the side of the stream opposite to the plaintiff's dam, contended that they had a good and legal right to one-half of the water in the main stream, and to carry it off by deepening an ancient outlet or canal. * * * It was held that the defendants had not a right to one-half of the water in the main stream of the river, so as to abstract it by means of the channel in question. The court said, in reply to the suggestion that the owners of the dam on the eastern side of the river had a right to half the water, and to divert to that extent: 'It has been seen that, if they had been the owners of both sides, they had no right to divert the water, without again returning it to its original channel. Besides, it was impossible, in the nature of things, that they could take it from their side only. An equal portion from the plaintiffs' side must have been mingled with all that was diverted.' "

The reason for permitting the plaintiff to condemn the water power or water right of the defendant, when the defendant cannot condemn the water power or water right of the plaintiff, is that the General Assembly has conferred this power upon the plaintiff and those doing a like business, and has denied it to the defendant.

The Chief Justice said in Railroad v. Oates, 164 N. C. 169, 80 S. E. 399:

"It would therefore seem that, if a company needed a water power to produce electric power, and styled itself 'an electric light and power company,' it could not condemn the water power of another for that purpose. Chapter 74, Laws 1907. But, if it styled itself 'a street and interurban railway company,' and should 'own land on one or both sides of a stream which can be used in developing water power,' it might have condemned the additional lands 'needed to fully develop such water power.' Chapter 302, Laws 1907."

The General Assembly, and not the courts, have made this distinction between the powers and rights granted to the plaintiffs and defendants respectively, and, as this is a question of state policy committed to the General Assembly, we must obey, not thwart its will.

It would seem that the defendant, who is represented as a "poor man" with "one little ewe lamb" (one-half of a water power on one side of a stream), ought to be grateful that it has escaped the payment of $40,000 for another "little ewe lamb" (one-half of the stream on the opposite side) of the same size and weight and kindred, which the jury had found was only worth $10,000. It will be remembered that Nathan was dealing in figures of speech when he was talking to David, and that David's answer was greatly kindled against the rich man, and that Nathan said to David: "Thou art the man."

CLARK, *C. J.* (dissenting).

This is a petition to rehear the decision in this case. 169 N. C. 472, 86 S. E. 296. The petition does not comply with the rule 53 of this court (81 S. E. xiv); for it does not "assign the alleged error of law complained of or the matter overlooked." The court withdrew the case from the jury by instructing them to answer the following issues "No," instead of leaving to them to answer these issues upon the evidence. These issues are as follows:

"(A) Are there water powers, rights, and properties on the land of the respondents as described in the petition capable of being developed for the production of electric power for use in connection with and in addition to the electric power already developed and in use by the respondent Hendersonville Light & Power Company?

"(B) Are there water powers, rights, or properties on the land of the respondents as described in the petition which are being held by the respondent Hendersonville Light & Power Company, to be used and to be developed for use in connection with or in addition

to any power now actually used by the said respondent Hendersonville Light & Power Company?"

Mr. Justice Hoke stated the matter clearly in his opinion in this case at the former hearing (Railroad v. Light & Power Co., 169 N. C. at page 480, 86 S. E. at page 300) as follows:

"Whether they [the defendants] can carry out their purpose and utilize this power in substantial aid of the power already developed, and without unwarranted interference with the rights of plaintiff, who owns along the opposite bank, is, in my opinion, a mixed question of law and fact, and, on the record, requires that the issue be submitted to the jury."

BROWN *J.*, also said (169 N. C. at page 479, 86 S. E. at page 300):
"I concur in the judgment of the court submitting a proper issue to the jury to determine the fact as to whether the defendant is using or holding its water power to be used or developed for use in connection with or in addition to any power actually used by it."

ALLEN, *J.* (with whom Walker, J., concurred), said:
"I do not think the defendant has any property in the water in the stream, and that it is only entitled to a reasonable use of it as it passes his land, which may include the use for manufacturing purposes."

This last is all that the defendant sought, and it is for its choice to say whether it shall use it by an undershot or an overshot wheel for grinding, or conduct it through a tube to a point lower down so that in that way its fall shall utilize the force of gravity, which will be converted into electricity and carried by cables to run the street cars and lights of the defendant, which is exactly the use to which the plaintiff itself seeks to apply it.

The testimony of the witnesses R. M. Oates, W. H. Banks, J. W. Seaver, and D. R. Shearer was ample to go to the jury, and indeed clear and explicit, that the defendants could develop on their half of the stream 1.260 horse power, and that this could be done without materially interfering with the rights of the plaintiff on the opposite side of the stream. As we held before, this evidence should have gone to the jury, and in withdrawing it the judge assumed to himself the functions of the jury, and denied to these defendants their constitutional rights.

This is a proceeding by the plaintiff to take from the defendants their one-half of a stream which is the boundary between the
139 two. It is admitted that the line between them runs to the middle of the stream, the defendants owning one half of the bed of the stream for half a mile on the south side, and the plaintiff owning the other half. The plaintiff alleges that it has a right to condemn this water power of the defendants notwithstanding a statute prohibiting the condemnation of any water power, because, as it alleges, the defendants cannot utilize it for that purpose, and therefore the plaintiff can take it against the will of the defendants. In Railroad v. Oates, 164 N. C. 169, 80 S. E. 398, and in Railroad v. Light & Power Co., 169 N. C. 472, 86 S. E. 296, we held that upon

the evidence this was an issue of fact which the defendants were entitled to have a jury pass upon. The plaintiff again insists for the third time that it can have the judge withdraw that issue from the jury and find as a matter of law that the defendants could not use their half of the stream to generate water power.

Laws 1907, c. 74, contains this provision:

"Water powers, developed or undeveloped, with the necessary land adjacent thereto for their development, shall not be taken" under condemnation proceedings.

This act was sustained in Power Co. v. Whitney, 150 N. C. 34, 63 S. E. 188.

There are many reasons why the defendants cannot be deprived of their property in this case without violating the guaranty that property shall not be taken, as was said in 169 N. C. at page 474, 86 S. E. at page 297—

"without due process of law and according to the law of the land. The defendants had the right to have these issues of fact [whether they could utilize their half of the stream] found by a jury, and only upon such findings the court should have imposed judgment of law."

In Dargan v. Railroad, 113 N. C. 596, 18 S. E. 653, it was said that:

"The right of the state to take private property rests upon the ground that there is public necessity for such appropriation."

It is not a public necessity that the plaintiff should take from the defendants the enjoyment of their property in this water power. When a railroad track is to be laid out from one point to another, the construction of the railroad being a quasi public matter, it is a public necessity that it shall lay out its line, with such restrictions as the statute requires, across the land of individuals, and therefore the right of eminent domain is conferred upon the railroad company, with the correlative right that, being a public corporation, it can be regulated by the state; but it is not a public necessity that the railroad company shall take the defendants' water power, which is not needed for its right of way and is merely a facility for the subsequent operation of the road. It would be as accurate to say that the plaintiff could condemn a coal mine 100 miles or more off its line to generate power for its engine, or a forest anywhere to obtain wood for its engines or cross-ties for its track as to say that it could condemn the defendants' falling water to generate electric power to move its engines. It would be as just to say that one railroad could condemn the engines or the freight cars or passenger cars of another company, because that would be a facility to operate its lines fully as much as to take from the defendants the water power which the defendants purchased to aid in running their street cars in Hendersonville, and to furnish light and power for the citizens of that town, for the convenience of the plaintiff in running its railroad.

But if it were conceded, as it cannot be, that it is a public necessity from the nature of the property, it is clear for many reasons that, while it would be a convenience, it is not a necessity at all: (1) The plaintiff and defendants might build a dam, or several dams, across the stream in its precipitous course and divide the water at the middle of the crest as Goat Island divides the Niagara Falls into the Canadian and American Falls. There is evidence, and it is also common knowledge, that this is practicable and has been done in many cases. (2) Or the plaintiff and the defendant might co-operate by having all the water conducted into one power plant and divide the electricity created equally between them. It is common knowledge that this has been done in many cases, and it is entirely practicable. The great power plants in the state thus divide and distribute the power generated by them to different towns and to different individuals. Certainly the plaintiff and defendants might divide it into two equal parts. (3) Or the defendants might by putting in a wing dam use their half of the water without in any wise diminishing the capacity of the plaintiff to use the other half. There was ample evidence in this case that this could be done, and that, as a matter of fact, it was being done at other points in the state and all over the country. While the defendants seemed to prefer this method to the other two above named, it was not restricted to this. It is entitled to use and enjoy its half interest in this water power, because it is evident that it can be utilized by them for the purpose of running their street cars and furnishing power and light.

In Lindeman v. Lindsey, 69 Pa. 99, 8 Am. Rep. 225, Mr. Justice Sharswood says:

"When the proprietors of the two opposite banks of a stream of water are desirous of enjoying the advantages of the water power for propelling machinery, a dam for that purpose cannot be built, except by mutual consent, unless, indeed, it may be what is termed a 'wing dam,' confined to the soil of the person who erects it, or that half of the bed of the stream which belongs to him."

This principle is also laid down by Shaw, C. J., in Elliot v. Railroad 10 Cush. (Mass.) 191, 57 Am. Dec. 88, quoted by Brown, J., in Harris v. Railroad, 153 N. C. 545, 69 S. E. 623, 31 L. R. A. (N. S. 543, 138 Am. St. Rep. 686.

139½ In Charnock v. Higuerra, 111 Cal. 473, 44 Pac. 171, 32 L. R. A. 190, 52 Am. St. Rep. 197, it was held:

"Since the right to make use of the stream is common to all who own property upon its shores, there would prima facie seem to be no cause of complaint * * * for any use made by another unless he was actually injured by such use."

And all the authorities held that whether the party is making a reasonable use is a question of fact. This case also is quoted by Brown, J. Harris v. Railroad, 153 N. C. 544, 69 S. E. 624, 31 L. R. A. (N. S.) 543, 138 Am. St. Rep. 686.

This stream in the half a mile that it flows between the plaintiff and defendants has a fall of 219 feet and is capable of generating

3,700 horse power, of which the defendants are entitled to use one-half. The witnesses give many instances in which one-half of the stream is thus utilized by wing dams, some of which are set out in this case. (169 N. C. at pages 475 and 476, 86 S. E. 296.) Whether the defendants can utilize one-half of the water by a wing dam is a matter of fact, and not of law. Prentice v. Geiger, 74 N. Y. 341; Bullard v. Mfg. Co., 77 N. Y. 525; Gould on Waters, § 220; Dumont v. Kellogg, 29 Mich. 420, 18 Am. Rep. 102; Hayes v. Waldron, 44 N. H. 580, 84 Am. Dec. 105; Merrifield v. Worcester, 110 Mass. 216, 14 Am. Rep. 592; Ulbricht v. Water Co., 86 Ala. 587, 6 South. 78, 4 L. R. A. 572, 11 Am. St. Rep. 72. And the books are full of similar cases.

What the defendant proposes is not a diversion of the water, taking it out of the stream, but to utilize the force of gravity contained in the falling of one-half of this water and converting it into electricity for the operation of its street railway, and furnishing power and light to its customers in fulfillment of its contract. This is not a navigable stream, and therefore the plaintiff cannot object that this use might diminish the depth of water on its side, if, indeed, it would have that effect. While the defendant stressed mostly its evidence that its half of the water could be utilized by a wing dam, it did not abandon its other rights, which have been held in many cases by the best courts. In Roberts v. Railroad, 74 N. H. 217, 66 Atl. 485, 124 Am. St. Rep. 962, it is said:

"The question, * * * therefore is whether they have a legal right to have the water divided and their share assigned to them in severalty, if that can be done without unreasonably interfering with the plaintiff's rights. It is clear they have such a right if the same rule is to be applied to * * * improved and unimproved water powers; for it is settled that the court has power to make such orders in respect to the way the several owners shall exercise their right in the common property as will be for the best interests of each of them, in so far as that can be done without any unreasonable interference with the rights of the others."

In Warren v. Mfg. Co., 86 Me. 39, 29 Atl. 929, 26 L. R. A. 288, it is said:

"As between opposite riparian owners upon the same channel, the court might have jurisdiction to equalize each owner's use of the water, and to mark out beforehand each owner's share, and this by any appropriate proceedings and instrumentalities. * * * Opposite riparian owners upon the same channel have a common and equal right to the use of all the water flowing in that channel as it passes their opposite lands. If the volume and flow of water be limited, the use by each opposite riparian owner may be limited by judicial action in proportion, so that the enjoyment be kept equal, like the right."

To same purport Soovil v. Kennedy, 14 Conn. 349; Olmstead v. Loomis, 9 N. Y. 423; Olney v. Fenner, 2 R. I. 211, 57 Am. Dec. 711; Lyon v. McLaughlin, 32 Vt. 423; and Burnham v. Kempton, 44 N. H. 78.

The defendants' interest in this stream is either a water power or

it is not. If it is a water power, then whether they can utilize it or not is an issue of fact for the jury upon the evidence which they have offered. If it is not a water power it is not subject to condemnation; for the plaintiff does not seek to condemn it for right of way. If the defendants' interest in this water is not a water power, neither is the plaintiff's interest, and the statute does not authorize it to create a water power by taking the defendants' interest which is not a water power. Besides, if the plaintiff could do this, the defendants could do the same.

The plaintiff occupies a most extraordinary position. It says, in effect, to the defendants:

"We will not permit dam or dams across the stream and a division of the water at the middle of the crest, whereby you may enjoy your half of the water power. We will not co-operate with you in putting up a plant to generate electric power, and divide the power produced. We will not permit you to put in a wing dam whereby you will utilize only your half of the water without detriment to us. We will not permit you to have a jury to decide upon the evidence whether either of these three methods can be used. We have offered you $1,000 for your half interest in this stream, and you have offered us $40,000 for our half. We will not accept your offer nor put the property up to the highest bidder. And, having thus prevented you from enjoying your half of this water power, we will cause the court to decree that you cannot utilize it, and therefore we will take your property."

It may be possible that some other plaintiff has thus boldly stated his intention to take the property of another because he has prevented that other from using it. But, if so, such case cannot be found by ordinary research. The plaintiff's attitude reminds us of the fable in Æsop. Irritated at the resistance of the owner, the plaintiff says, in effect, to the defendants:

"Anyway, I need your property in my business, and I'll take it."

The defendants further contend that they are entitled to be protected in their rights under the provisions of the federal Constitution; that they shall not be deprived of their property "without due process of law, nor denied the equal protection of the law," on four grounds:

(1) It is not the "law of the land" that property off the
140 line of the railway not needed for its construction can be taken by a railroad company merely to aid in its operation such as a coal mine, or wood for fuel or for cross-ties or water power. Such property for such purposes cannot be taken under "due process of law."

(2) Neither can public property like that of the defendant, already devoted to the same public purpose, be taken under the right of eminent domain. Lewis' Em. Dom. § 400. As well might one railroad company condemn the track, or the engines, or the cars of another. While one road can condemn a right of way across the track of another, it does not take the sole and exclusive use of the track at that point, as the plaintiff seeks in regard to the property of the defendant.

(3) Both the state and federal Constitutions guarantee the right of trial by jury as to disputed issues of fact. Putting the case most strongly for the plaintiff, whether or not the defendants can utilize their half interest in this water power is upon the evidence a much-disputed issue of fact, and the court could not deprive them of this right under "the law of the land."

(4) The public policy of the federal and state government, as shown by statutes and by decisions, notably in the judgments dissolving the American Tobacco Company, the Standard Oil Company, the Sugar Trust, the Hartford & New Haven Railroad Combination, and many other cases, is that such combinations are injurious to the public welfare and "contrary to the law of the land." The department of justice is considering instituting similar proceedings to dissolve the great water power trusts which are taking into their control the most vital source of heat, power, and light—the water powers of the country. A recent publication made by authority of the United States government, of which we take judicial notice, shows that in this state already two companies, the Southern Power Company and the Carolina Power & Light Company, own 75 per cent. of the water power of this state, and that eight companies control 94 per cent. of the total water power of the state, while 49 cities and towns all together control only 1 per cent.

If the plaintiff can, through the courts, wrest from the defendants the enjoyment of their half of this water power which is being used for the town of Hendersonville, then that much will be taken from the 1 per cent. of water power which these 49 cities utilize to be added to the 94 per cent. which has been gathered by the 8 corporations which the government reports, even if some of these 8 are not merely aliases for the larger ones. It appears that both the president and the secretary and treasurer of the plaintiff company are directors in the Northern & Piedmont Railroad Company, which the latter in his testimony states is known as the "Duke Road." It is common knowledge that the Southern Power Company, one of the companies reported by the government as engrossing the water power of this state, is controlled by the same interest. The defendants have the right, in this proceeding, to have a jury pass upon the question whether the plaintiff company is not potentially the property of the same financial "interest"; for, if so, to grant to it the right to absorb this property and take it from the defendants is in violation of the "law of the land" which the government is seeking to enforce against these great trusts and combinations which would take to themselves the entire water power of the state—the source of light, heat, and power of the future. For these reasons, the defendants invoke the protection of the Fourteenth Amendment at the hands of the courts. It would seem, therefore, that the property of the defendants is not subject to condemnation, and that the plaintiff cannot, by preventing the defendants from using it, make it subject to condemnation, and that in any aspect the defendants are entitled to a trial by jury, and that to deprive them of such right is in violation of both the state and federal Constitutions.

Joseph B. Lee, "one of the owners and directors of the plaintiff

company" (as he styles himself), testified that, as such, he offered the defendants $1,000 for their one-half of this water power, which he "thought was a fair offer." But he admitted on cross-examination that he refused to take $40,000 for the plaintiff's half when offered by the defendants. The uncontradicted testimony is that the defendants had $40,000 in bank to back this offer, though it was admitted that the defendants' capital was small as compared with that of the plaintiff.

The plaintiff's evidence was that it was intended to spend $2,000,000 on the development of this water power. Under the statute a water power plant cannot condemn another's water power, whether in use or not. This is only allowed to an interurban railroad company, and even then only if the water power sought to be condemned is "not being used, or held to be used, for development by its owner." The sum of $2,000,000 intended to be spent by the plaintiff on this plant is evidence for the jury to consider whether it is seeking bona fide to take the defendants' water power merely for an interurban railroad, or to create a water power. Indeed, the complaint avers an intention to build a very short railroad and "to sell its surplus power." In the latter event the plaintiff cannot condemn even an unused water power. The plaintiff says it will not sell its half of this water power, which is only a small part of its holding, for $40,000, but, strangely enough, it insists that it shall be allowed to use the "strong arm" of the law to take all the water power of the defendant, being the other half of the stream at this point, for $10,000! Such claim is not founded in justice, without respect to persons, nor consonant to the sentiment of the ages.

141 "Nathan said unto David, there were two men in one city, the one rich and the other poor. The rich man had exceeding many flocks and herds; but the poor man had nothing save one little ewe lamb which he had bought and nourished up; and it grew up with him and with his children; it did eat of his own meat and drank of his own cup and lay in his bosom, and was unto him as a daughter. And there came a traveler unto the rich man and he spared to take of his own herd to dress for the wayfaring man that had come unto him; but took the poor man's lamb and dressed it for the man that was come unto him."

We know the story of Naboth's Vineyard. But they who have been to Potsdam, near Berlin, will remember that, when Frederick the Great was gathering in the lands to make the famous park for his palace at Potsdam, there was a miller whose little tract was included within the bounds of the park who refused to sell at any price. When the great king was advised to take it anyway, though one of the most arbitrary of men, he replied:

"Let the miller keep his mill, that it may be known that there is law in Prussia."

The rustic mill still stands, kept in repair at public expense, and and on it in gold letters there still abides this inscription:

"Let the miller keep his mill, that it may be known that there is law in Prussia."

HOKE, J. (dissenting):

When this case was formerly before the Court, it was decided that the question at issue between the parties should be referred to the jury. In a concurring opinion then filed my position was stated. 169 N. C. 471, 86 S. E. 300.

On further consideration I am confirmed in the opinion thus expressed that the issue should be referred to the jury, and I therefore dissent from the present disposition of the appeal.

142 NORTH CAROLINA:

Supreme Court, February Term, 1916, Henderson County.

No. 505.

BLUE RIDGE INTERURBAN RAILWAY CO.
VS.
HENDERSONVILLE LIGHT & POWER CO. et al.

Judgment.

This cause came on to be argued upon the granting of plaintiff's petition to rehear the appeal from the Superior Court of Henderson County: upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore, considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable George H. Brown, Justice, be certified to the said Superior Court, to the intent that the judgment of the Superior Court be affirmed. And it is considered and adjudged further, that the defendants do pay the costs of the appeal in this Court incurred, to-wit, the sum of Twenty-nine 70/100 dollars ($29.70), and execution issue therefor.

A true copy.

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk of the Supreme Court.

143 SUPREME COURT OF NORTH CAROLINA:

I, J. L. Seawell, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and correct copy of the transcript of appeal to this Court, including the petition to rehear, in the case lately pending in this Court entitled Hendersonville Light & Power Company and Saluda-Hendersonville Interurban Railway Company, Plaintiffs in Error, vs. Blue Ridge Interurban Railway Company, Defendant in Error, as appears from originals on file in my office.

Witness my hand and seal of said Court at office in Raleigh this 24th day of May, 1916.

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk of the Supreme Court of North Carolina.

Endorsed on cover: File No. 25,318. North Carolina Supreme Court. Term No. 497. Hendersonville Light and Power Company and Saluda-Hendersonville Interurban Railway Company, plaintiffs in error, vs. Blue Ridge Interurban Railway Company. Filed May 27th, 1916. File No. 25,318.

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In the Supreme Court of the United States.

No. 497.

HENDERSONVILLE LIGHT AND POWER COMPANY, AND SALUDA-HENDERSONVILLE INTERURBAN RAILWAY COMPANY,
PLAINTIFFS IN ERROR,

v.

BLUE RIDGE INTERURBAN RAILWAY COMPANY,
DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA, ON MOTION TO DISMISS OR AFFIRM.

BRIEF OF COUNSEL FOR PLAINTIFFS IN ERROR ON MOTION TO DISMISS OR AFFIRM.

PURPOSES OF THE ACTION.

Plaintiffs in error insist that defendant's motions should be denied for that:

I.

An examination of the record in this cause shows that one of the purposes of the action brought by the defendant in error against the plaintiffs in error in the Superir Court of Henderson County, North Carolina, was to condemn the lands, water rights, water power and property of the plaintiffs in error, for PRIVATE USES.

II.

That defendant in error sought, and was allowed by the judgment of the Court, to condemn the lands, water power and water rights of the plaintiffs "(d) *To construct, equip and maintain buildings, works, factories and plants; to install, maintain, and operate all kinds of machinery and appliances; to operate the same by hand, steam, water, electric or other motive power, and generally to perform all acts which may be deemed necessary, or expedient, for the proper and successful prosecution of the objects and purposes for which the corporation is created.*"

III.

That the Charter of the defendant in error authorized it to condemn lands for *both public and private uses*, and that in this proceeding *there is no separation of the public from the private uses*, for which the property of the plaintiffs in error has been condemned.

IV.

That a Federal question was duly and properly raised in this cause on the trial in the first instance, in that the plaintiffs in error alleged, record, p. 21, paragraph 6, that "*The condemnation of the lands described in the 5th paragraph of the petition, in the manner and for the purposes alleged in said petition, would be the taking of private property, without due process of law, and in violation of the Fourteenth Amendment to the Constitution of the United States.*"

V.

That a Federal question is necessarily involved in the disposition of the case by the State Court, for that no judgment could have been entered in the cause condemning the property of the plaintiffs in error for a *use not public in its nature, without violating the Fourteenth Amendment to the Constitution of the United States, which prohibits the taking of the property of one person by another, without due process of law.*

VI.

That Federal questions were raised, and actually decided by the Supreme Court of the State of North Carolina, and the rights of the plaintiffs in error, asserted and claimed under the Constitution of the United States, were distinctly denied, as appears from the dissenting opinion of the Chief Justice of the Supreme Court of North Carolina, record, pp. 107, 108.

VII.

That it is the purpose of the defendant in error, which owns a large amount of valuable water power property in North Carolina, to make use of the powers granted to it, to operate an Interurban Electric Railway, which can be operated by the use of not more than one thousand electric horse power, to condemn the property of the plaintiffs in error, so as to enable them to develop from thirty thousand to sixty thousand electric horse power, to be used for private purposes, for running cotton mills, and other mills and plants belonging to the officers and stockholders of the defendant Company, or in which they are interested, contrary to the spirit and meaning of the statutes of North Carolina, and contrary to the Constitution of the United States, *for that such condemnation is for a private use, and not for a public use.*

HISTORY OF THE LITIGATION.

Certain gentlemen, to-wit: W. S. Montgomery, John A. Law, A. L. White, Joseph Lee, and other business men associated with them, a good many years ago "for the purpose of securing power with which to operate certain cotton mills, that they were connected with or interested in near Spartanburg, S. C.," purchased certain lands and water power on Green River, in Polk and Henderson Counties, North Carolina, record, p. 37.

This property was held in the name of Appalachian Power Company, record, p. 38. Later the Appalachian Company was merged into the Manufacturers Power Company, p. 38. The Manufacturers Power Company

was succedeed by the defendant Company, pp. 47, 48-49. The Blue Ridge Interurban Railway Company, defendant in error, was organized for the purpose of condemning water power properties, because its predecessor, under the laws of North Carolina, could not condemn water power properties, for the reason that they were not authorized by their Charters to build and operate electric railroads.

At the time of the bringing of this action, the plaintiffs in error owned the lands on one side of Green River, in Henderson and Polk Counties, North Carolina, record, p. 15, which lands are sought to be condemned by this proceeding. At the commencement of this action, and for some time prior thereto, the Hendersonville Light & Power Company, hereinafter called the Hendersonville Company, owned two electric plants on Big Hungry Creek in Henderson County, North Carolina, above the lands sought to be condemned in this cause, and was holding the lands in question for the purpose of developing the same and using it as an additional source of power to supply the public with electric lights and electric power, for general public purposes. The defendant in error owned the lands on one side of Green River, opposite the lands owned by the plaintiffs in error, and undertook by this proceeding to condemn the lands owned by the plaintiffs in error. The action was brought in the Superior Court of Henderson County, North Carolina, June 7, 1913, record, p. 12. The petition for condemnation sought to take the lands of the plaintiffs in error, *as set out in said petition,* for the purposes of operating street and interurban railways; of erecting and maintaining a water power plant on Green River to be used in operating railroads for the purpose of selling and disposing of the surplus electricity developed by the plant, and for the purpose of constructing, equipping and maintaining buildings, works, factories and plants; and installing, maintaining and operating all kinds of machinery and appliances, operating same by hand, steam, water, electric or other power, record, p. 25.

In paragraph two of the petition it is alleged that the defendant in error had purchased lands and water powers at much cost and expense, paying out more than $200,000 therefor, and that its proposed developments, when completed, "will produce, approximately, fifty thousand horse power," record, p. 15.

In paragraph three it was alleged that it was the purpose of the petitioner, defendant in error, to build and equip a street railway from Hendersonville, through the towns of Flat Rock and Saluda, to a point on Green River, at or near the mouth of Big Hungry Creek in Henderson County, p. 15. But see resolution stockholders, page 24.

In Sections 4 to 9, it was alleged that "In order to operate said railroad it is necessary for the petitioner to generate electric power by developing same on Green River; and *in order to fully develop said power according to the plans of the said Engineers*, it is necessary to construct a dam about one hundred and fifty feet in height" and divert the water power from the property of the plaintiffs in error.

It was nowhere alleged in the petition that it *was necessary to condemn the property of the plaintiffs in error in order to generate electricity to operate the railroad.* It was *admitted on the trial by the Secretary and Treasurer of the defendant in error*, as will be hereinafter more fully set forth, p. 26, that one thousand electric horse power, was sufficient to operate the alleged proposed railroad, thus showing that there was no necessity for the condemnation of the property of the plaintiffs in error.

The questions of fact and issues of fact, which were found by the Court and submitted to the jury and answered under the directions of the Court, are set out on page 22 of the record, as follows:

FINDINGS OF FACT.

"1. Is it the intention of the Blue Ridge Interurban Railway Co., the petitioners, in good faith to conduct and

carry on the public business authorized by its charter as set forth in paragraph One of its petition?

"Answer: Yes.

"2. Does the petitioner, the Interurban Railway Co., own lands on Green River, on one or both sides, and its tributaries in Henderson and Polk Counties, which can be used for the development of a water power?

"Answer: Yes.

"3. Is it the purpose and intention of the petitioner in good faith to build, construct, equip and operate a street and interurban railway from the Town of Hendersonville, through Flat Rock and Saluda, to a point on Green River at or near the mouth of Big Hungry Creek in Henderson County, as alleged in paragraph Three of the petition?

"Answer: Yes.

"4. Is it necessary for the petition to generate electric power by developing same on Green River to operate said alleged Street Railway?

"Answer: Yes.

"5. Did petitioner, prior to commencement of this proceeding, make a reasonable offer to agree with the respondent for the purchase of the right to divert the water from the lands of the respondents, as set forth in the petition?

"Answer: Yes.

"6. Was the petitioner's special proceeding for the condemnation of the property rights of the respondents as described in the petition for a public use?

"Answer: Yes.

"7. Is it necessary in order to fully develop petitioner's alleged water power on Green River for the purpose alleged in its petition to condemn the rights described in the petition?

"Answer: Yes.

"8. Is the respondent, the Hendersonville Light & Power Company, a corporation now engaged in the actual service of the general public?

"Answer: Yes.

The Court submits to the jury the following issues:

"A. Are there water powers, rights and properties on the land of the respondents as described in the petition capable of being developed for the production of electric power for use in connection with and in addition to the electric power already developed and in use by the respondent, Hendersonville Light & Power Company?

"Answer: No.

"B. Are there water powers, rights or properties on the lands of the respondents as described in the petition which are being held by the respondent, Hendersonville Light & Power Company, to be used or developed for use in connection with or in addition to any power now actually used by the said respondent, Hendersonville Light & Power Company?

"Answer: No.

"C. What compensation are defendants, or either of them, entitled to recover for the acquirement by condemnation by the petitioners of the right to divert the water in the manner set forth in the petition?

"Answer: Ten Thousand Dollars ($10,000.00)."

An examination of these findings shows that it was nowhere found by the Court that it was necessary to condemn the property of the plaintiffs in error, in order to operate the proposed railway, but instead thereof, it was found as a fact only that it was necessary to generate electric power by developing the same on Green River, to operate the alleged railway (finding 4); and in finding seven that it was necessary in order to fully develop petitioner's alleged water power on Green River to condemn the property of the plaintiffs in error. *There was no finding that the condemnation of the property of the plaintiffs in error was necessary for any public use.*

JUDGMENT.

A judgment was rendered in the Superior Court of Henderson County, record, p. 81, to the effect "that the

rights sought to be condemned in the petition in this cause, that is, the right to divert Green River from the lands of the respondents, as set forth in the petition, be condemned to the use of the petitioner (defendant in error) for the *purposes set forth in the petition.*"

From this judgment it will be seen that the condemnation was not limited to any public purpose, but was allowed for the "purposes set forth in the petition."

The respondents assigned error according to the practice in the Supreme Court of North Carolina, as set out in the Summary of Exceptions, pages 82 to 84 of the record, as follows:

EXCEPTIONS IN STATE SUPREME COURT.

"EXCEPTION ONE: That the Court refused to allow the respondents' motion for judgment as of non suit at the close of the petitioner's evidence.

"EXCEPTION TWO: That the Court refused to allow the respondents' motion for judgment as of non suit at the close of all the evidence.

"EXCEPTION THREE: That the Court refused to give the following special instructions petitioner, of which developments the lands of the respondents forms 'That of the stream, Green River, is in entirety, within the land described in the petition and the land adjoining said stream on the opposite side thereof, constitutes a water power, then one-half of said stream, being an integral part of said water power, right or property, would not be subject to condemnation and you would therefore answer the second issue yes.'

"EXCEPTION FOUR: That the Court refused to give the special instruction requested by respondents in writing and in apt time, to-wit:

"That the entire stream, Green River, along the water front of respondents' land is a water power, and if the one-half of said stream owned by the respondent is condemned for the use of the petitioner, then the value of

said one-half should be taken into consideration in estimating the amount of damages to which the respondents are entitled, as well as all the other facts and circumstances tending to show the value of the proposed water power development of the petitioner, of which development the lands of the respondents form an integral and necessary part according to the contentions of the petitioner.

"EXCEPTION FIVE: That the Court refused to give the following special instructions requested by the respondents in writing, in apt time, to-wit:

"That if the jury should find from the evidence that the stream, Green River, in its entirety, between the land described in the petition and the lands of the petitioner on the opposite side of the stream, contains a water power capable of development, and that such development, when made, has a market value, then it would be the duty of the jury in estimating the compensation to be awarded the respondents for the condemnation of their lands, to consider the value of such development to which such water power may be adaptable; and if the jury should find that the respondents own one-half of the water power capable of development, then it would be the duty of the jury to award, as compensation to the respondents for the taking of their lands or water rights one-half of the value of such water power capable of such development.

"EXCEPTION SIX: That the Court charged the jury as follows, to-wit: There will be only three issues submitted for your consideration, two of which the Court will instruct you later on, if you believe the evidence in this case, you will answer the first and second issues, or issues A and B 'no' and really when you go out to consider your verdict you will only have one issue to consider, that is, the issue as to the question of damages.

"EXCEPTION SEVEN: That the Court further charged the jury as follows, to-wit: * * *and so the Court now instructs you, if you believe all the evidence given in this case, that it is your duty to answer this issue

A, 'No.' The Court so instructs you that if you believe all the evidence in this case you will answer the first issue 'No.'

"EXCEPTION EIGHT: That the Court charged the jury as follows, to-wit: The same instructions which I have given in regard to the first issue, called issue A, I give you in regard to the second issue which I will call issue B, and upon the same principles of law, and without needlessly going over them again, I instruct you as to this issue, if you believe all the evidence offered by both sides in this case, that it is your duty to answer the second issue B, 'No.'

"EXCEPTION NINE: That the Court rendered the judgment which appears in the record."

In the Supreme Court of North Carolina the case was first heard May 14, 1915, and on the 22nd of September, 1915, an opinion was delivered by the Chief Justice and concurring opinions by the other members of the Court, granting the plaintiffs in error a new trial, record, pp. 87 to 96. A petition to re-hear the case was filed October 30, 1915, record, p. 95, and thereafter on March 22, 1916, a decision rendered by three members of the Supreme Court, reversing the former opinion of the Court, and affirming the judgment of the Court below, record, pp. 97 to 102. The Chief Justice of the Supreme Court of North Carolina, filed a dissenting opinion, record, pp. 102 to 109, and Associate Justice Hoke also dissented, record, p. 10.

This writ of error was granted by the Chief Justice of the Supreme Court of North Carolina on the 16th day of May, 1916, and the cause brought to this Court on assignments of error as set out on pages 3 to 8 of the record, as follows:

ASSIGNMENTS OF ERROR.

1.

The Supreme Court of North Carolina erred in holding

that property off of the line of a railroad, not needed for the constructin of the railroad, can be taken by a railroad company merely to aid in its operations, in that said holding is in contravention of the "law of the land", and deprives the plaintiffs in error of their property "without due process of law" and in violation of the Fourteenth Amendment of the Constitution of the United States.

II.

The Supreme Court of North Carolina erred in holding that public property, like that of the plaintiffs in error already devoted to the same public purposes, could be taken by the right of eminent domain, in that said holding denies to the plaintiff in error the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

III.

That the Supreme Court of North Carolina erred in holding that the plaintiffs in error were not entitled to submit to the jury their contention that they can develop a water power on the side of the stream owned by them by means of a wing dam, or by means of a flume, or by otherwise diverting and returning the water on their property, or by dividing the water by a dam in the center of the stream, in that said holding deprived the plaintiff in error of the "right of trial by jury," and permitted the defendant in error to take from the plaintiff in error the property of the latter "without due process of law" contrary to the Fourteenth Amendment of the Constitution of the United States.

IV.

The Supreme Court of North Carolina erred in holding that the plaintiffs in error were not entitled to have the jury pass upon the issue A and B, respectively, in words as follows:

"A. Are there water powers, rights and properties on the lands of the respondents as described in the petition, capable of being developed for the production of electric power for use in connection with and in addition to the

electric power already developed and in use by the respondent Hendersonville Light and Power Company?"

"B. Are there water powers, rights or properties on the lands of the respondents as described in the petition which are being held by the respondent Hendersonville Light and Power Company, to be used and to be developed for use in connection with or in addition to any power now actually used by the said respondent Hendersonville Light and Power Company?",

in that said holding allowed the defendant in error to take the property of the plaintiffs in error "without due process of law", and without the plaintiff in error "equal protection of law", and without a "trial by jury", contrary to the Fourteenth Amendment to the Constitution of the United States.

V.

The Supreme Court of North Carolina erred in holding that the property of the plaintiff in error was subject to condemnation at all, for the purpose for which it is sought to be taken by the defendant in error, to-wit, in order to make a more economical and comprehensive power development and thus abtain a very large surplus of hydro-electric power for the purpose of a private enterprise to operate mills in the State of South Carolina and elsewhere, it appearing from the record that the defendant in error already has available for development many times the power necessary to operate its alleged interurban railway, which railway, as also appears from the record, is but an incident to the private purposes of the defendant in error, therefore the taking of the property of the plaintiff in error under such circumstances was a violation of its rights and contrary to the Fourteenth Amendment to the Constitution of the United States.

VI.

The Supreme Court of North Carolina erred in the above cause for that it appears from the petition of the defendant in error, filed in said cause, (paragraph one), that the defendant in error sought to condemn the proper-

ty of these petitioners for uses and purposes other than public uses and purposes; that in said petition and in said proceeding the defendant in error in no way set forth what properties it proposed to condemn for public use and what property it proposed to condemn for private use, and that the decision of the Supreme Court of North Carolina permitted the said defendant in error to take the property of the plaintiffs in error for uses other than public uses; that is to say, for private uses, contrary to the Constitution of the United States and in violation thereof. That your petitioners allege that the judgment in this case deprives them of their property without due process of law and denies to them the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

VII.

That it appears that the Supreme Court of North Carolina erred in rendering judgment therein, for that it appeared from the petition in said cause that the only public purpose for which the defendant sought to condemn the property of your petitioners was to operate a street and interurban railway from the city of Hendersonville through the towns of Flat Rock, and Saluda, to a point on Green River, at or near the mouth of Big Hungry Creek in Henderson County, as set forth in paragraphs one and three of the original petition in this cause. And that it appeared upon the trial of said cause, as testified to by the secretary and treasurer and one of the directors of the defendant in error, that one thousand electric horse power was sufficient to operate the proposed railroad, but that the proposed development for which the property of the plaintiffs in error was to be condemned would enable the defendant in error to develop between thirty thousand and forty thousand electric horse power, from twenty-nine thousand to thirty-nine thousand more horse power than was necessary to operate the alleged prospective railroad of the defendant in error. And the plaintiffs in error allege that the judgment of the Supreme Court of North Carolina was erroneous because it so permitted the defendant

in error to take the property of the plaintiffs in error when there was no necessity therefor, and for uses other than public uses, and contrary to the Constitution of United States, and deprived them of their property without due process of law and denied to them the equal protection of the laws, contrary to the Fourteenth Amendment of the United States.

VIII.

For that the Supreme Court of North Carolina erred in holding that the defendant in error had a right to condemn the property of the plaintiffs in error under the facts and circumstances in this case, upon the grounds that it appeared upon the trial of said cause, and plainly appears from the record in said cause that the defendant in error owned other power property, which when developed, taken alone and without the use of any of the property of the plaintiffs in error, would be amply sufficient and more than sufficient to supply all of the public uses claimed by the defendant in error to be necessary to be supplied, and that therefore the said judgment deprives the plaintiffs in error of their property without due process of law, contrary to the Constitution of United States, and especially to the Fourteenth Amendment thereof.

IX.

That the judgment of the Supreme Court of North Carolina in said cause is erroneous, for that it ignored the rights of the plaintiffs in error to be protected in their property by the Constitution of the United States, and ignored the rights of the plaintiffs in error, as claimed and set up in paragraph six of the answer filed in said cause by the plaintiffs in error, contrary to the Constitution of United States and in violation to Fourteenth Amendment to the Constitution of United States, as hereinbefore particularly set forth.

X.

The Supreme Cour of North Carolina erred in holding that the plaintiffs in error were not entitled to have investigated the contention made that the defendant in errer is

such a combination as is injurious to the public welfare and contrary to the law of the land, in that said holding denied to the plaintiff in error the protection of their rights guaranteed by the Fourteenth Amendment of the Constitution of the United States and the Acts of Congress regulating and governing combinations of trade, monopolies and trusts, and allowed the plaintiffs in error to be deprived of their property without due process of law and denied to the plaintiffs in error equal protection of the laws.

XI.

That the Supreme Court of North Carolina erred in refusing to sustain Exception No. 2 and Assignment of Error No. 2 of the plaintiffs in error, to the refusal of the Court below to grant their motion for judgment as of nonsuit, at the close of the evidence, for the reason that it appears from the record in said cause and from the findings of fact by the judge therein that the defendant in error sought to condemn and was permitted to condemn the property of the plaintiffs in error for a use not a public use and when there was a necessity therefor, in contravention of the Constitution of the United States and especially the Fourteenth Amendment thereof, and that the plaintiffs in error were thus deprived of their property without the due process of law and were denied the equal protection of the laws, contrary to the Fourteenth Amendment of the Constitution of United States.

XII.

That the Supreme Court of North Carolina erred in refusing to sustain Exception No. 2 and Assignment No. 2 of the plaintiffs in error, to the refusal of the Court below to grant their motion for judgment as of non-suit, at the close of the evidence, for the reason that it appeared from the record in said cause that the defendant in error sought to condemn the property of the plaintiffs in error for an alleged public purpose, to-wit, the operation of a street railway and for the purpose of generating electricity to be used wherever needed, and desired, and for the

purpose of constructing, equipping and maintaining buildings, works, factories and plants, and to install, maintain and operate all kinds of machinery and appliances, to operate the same by hand, steam, water, electric or other motive power and for performing all acts which may be deemed necessary by said defendant in error for the prosecution of the objects and purposes for which it was incorporated, contrary to the rights of the plaintiffs in error as guaranteed to them by the Constitution of the United States, and especially the Fourteenth Amendment thereof, and by reason of which the plaintiffs in error are deprived of their property without due process of law, and are denied the equal protection of the laws in contravention to the Constitution of the United States.

For which errors, the plainiffs in error, Hendersonville Light and Power Company and Saluda-Hendersonville Interurban Railway Company, pray that the judgment of the Supreme Court of North Carolina, dated 22 day of March, 1916, be reversed and a judgment rendered in favor of the plaintiffs in error, and for the costs.

MICHAEL SCHENCK,
MARTIN, ROLLINS & WRIGHT,
Counsel for plaintiffs in error.

ANALYSIS OF THE TESTIMONY

Since the plaintiffs in error insisted upon the following positions. (1). There is no evidence in the record in this cause that any necessity existed to condemn the property of the plaintiffs in error for the purpose of operating the electric railway mentioned in the petition filed in the trial Court. (2). That taking all of the evidence, which appears in the record, it plainly appears that the defendants in error sought to condemn, and was allowed to condemn the property of the plaintiffs in error for *a private use or uses*,—an analsysis of the testimony bearing on these questions is deemed essential to a proper understanding of the case.

The defendant in error introduced John A. Law, Sec-

retary and Treasurer of the defendant Company, whose testimony appears on pages 24 to 27 of the record. They also offered in evidence, record p 24, a resolution of the stockholders of the defendant Company, which was the *only testimony of corporate action on the subject,* which reads as follows: *"That it is the sense of the stockholders of the Company that immediate steps be taken looking to the construction of a dam, power house and other necessary appurtenances for creating .of .hydroelcctric power on Green River between a point at or near Big Hungry Creek and Henderson's Island, and that we proceed to get the necessary easements for that purpose, and also for the purpose of constructing a railroad beginning at or near the dam site and running thence to the Southern Railway at or near Saluda."*

The witness Law then testified that pursuant to the resolution mentioned they had employed engineers, who had submitted preliminary plans; that it was the purpose of the Company to build an interurban railway from Saluda, a station on the Southern Railway, to the proposed dam, thence to Flat Rock and Hendersonville; that the railway feature of the development has been in contemplation since the history of the organization, 1906 or 1907; that they had no definite plans; had projective plans; that "the electricity is to be used in supplying public utilities in this section, and operatng cotton mills and operating this railroad." That the original Company was a Green River Power Company, under a commission obtained in South Carolina; that previous to that a Company had been organized called the Appalachian Power Company; that these two companies were merged, and a charter was taken out for the Manufacturers Power Company, and then later on the Blue Ridge Interurban Railway Company, the defendant in error, page 26.

The witness testified that he was a banker and cotton mill manufacturer; that the proposed development would be between thirty thousand and forty thousand horse power; that he did not know the amount required for the operation of the railroad; *that from general information*

he thought it would take not more than one thousand horse power; that they would have twenty-nine thousand to thirty-nine thousand surplus if the railroad never grew any larger; *that they proposed to use some of that power for running cotton mills in South Carolina;* that they had properties (water power properties) at Turner Shoals, Foster Shoals, Hungry Creek (the one mentioned in this proceeding as the dam proposed to be erected which would overflow the properties of the plaintiffs in error) and Potts Shoals; that their present plan would not cover the Turner and Foster properties; that the directors of the Company—W. S. Montgomery, H. L. Bomar, Joseph Lee, George Ladshaw, A. L. White, the witness and W. A. Law were bankers and cotton mill men; that it was the object and intention of the petitioners in good faith to construct, equip and operate this Interurban railway as a common carrier of passengers and freight.

Defendant also offered in evidence a letter addressed to the plaintiffs in error, page 27, in which they said that the diversion of the waters of the stream "is necessary in order to carry out the plans of the company, which contemplate the erection of a dam just below the mouth of Big Hungry Creek, and the conveyance of the waters of the stream, over and across the lands of the company to the foot of the mountain, where the power house will be located in the cove, for the purpose of generating electricity to propel street and interurban railway cars and other machinery. To obtain this easement the Blue Ridge Interurban Railway Company is willing to pay more than it is worth as its plans are urgent. It, therefore, offers to pay for the easement the sum of *One Thousand Dollars.*"

The defendant in error also offered the reply of the plaintiffs in error to said letter, in which the plaintiffs in error offered to the defendant in error *Forty Thousand Dollars* for exactly the same quantity and character of property, being the land on the opposite of Green River, as that for which the defendant in error offered One Thousand Dollars, and which they were allowed to con-

demn in this cause for Ten Thousand Dollars, see record, p. 28.

George Ladshaw, one of the Directors of the defendant in error, and a hydraulic engineer, testified that the proposed power plant would produce *fifty-eight thousand horse power* for four months in the year, and probably *thirty thousand* horse power the remainder of the time, record, p. 32; that there would be approximately 1300 H. P. taking both sides of the river at the place proposed to be condemned, record, p. 33; that they had not completed the survey of the road, p. 36; that they had not broken any earth for the railroad; had done nothing at all, p. 37; that the maximum capacity of the proposed development would be 50,000 H. P.; what it takes to run the railroad will depend entirely on the amount of business that is being done; it takes 75 to 80 H. P. to run a car; there would be very little of this power that they could use for railroad purposes; that he could not tell what they were going to use it for; that the railroad was contemplated to go in various directions; that they did not survey any of the lines; that they could use 10,000 or 15,000 H. P. for the railroad; that cotton mills offered a first-class market; that they were talking about going to the cotton mills at Marion, and that he had sworn that several years ago that he and several other business men, for the purpose of securing power to operate cotton mills with which they were connected at or near Spartanburg, S. C., had purchased the water power on Green River, now owned by the defendant in error.

T. B. Lee testified that he was an engineer and had been interested in the defendant in error, pages 39 to 45; that before he transferred his interest to his son in the proposed development, he investigated how they would build the Hungry development, page 43; *that he saw it was absolutely necessary to build a line from the railroad down to Hungry, and also a branch of it, down to Fish Top, to put THE MACHINERY AND MATERIAL IN,* page 43; *that they knew if they were going to develop Hungry they had to build a railroad from the Southern*

Railway to the dam and to where they proposed to put the power house; that he did not make an estimate with a view of making a public railroad, p. 43; that he did not say that a railroad from the mouth of Hungry would be a practical business venture, p. 44; *that he proposed to build the railroad down there for the purpose of building that development;* and it would be highly profitable to the Company, and be used afterwards for public utilities, p. 44.

W. S. Montgomery testified, p. 48, that he was President of the defendant Company; that it was the intention of the Company in good faith to carry out its plans for building a railroad and erect a dam for the developing and sale of power.

This is substantially all of the testimony offered by the defendant in error bearing, as we conceive, on the propositions stated above, and under these circumstances plaintiffs in error insist that the trial Court erred in refusing to grant their motions for judgment as of non suit, Exceptions One and Two, page 82, and that the Supreme Court of North Carolina erred in not sustaining said Exceptions for judgment as of non suit, because there was no evidence that it was necessary to condemn the property of the plaintiffs in error in order to operate the public utility, to-wit: the electric railroad referred to in the record, for that all the testimony shows that the defendant in error had three other valuable water powers capable of development, and that without the use of the property of the plaintiffs in error, and without condemning the same, a very large power could be produced, and that by the proposed condemnation proceedings, the defendant in error would develop a power, variously estimated, at from 30,000 to 59,000 H. P., and that not more than 1,000 H. P. was necessary, in any event, for the proposed railroad, and, therefore, there was no necessity to condemn the property of the plaintiffs in error.

The plaintiffs in error further insist that a perusal of the testimony in this case will show that the proposed railroad is a fake. It is merely put in this record in order to permit the defendant in error to condemn prop-

erty. The testimony shows that the line of proposed railroad will run through a rough mountainous country, where there are no inhabitants, and that in fact the resolution of the stockholders, which is really the only competent evidence to be considered on the question, contemplated the building of a railroad from Saluda, a station on the Southern Railway, to the proposed dam site, and that one of the engineers of the defendant in error, testified that the object in building an electric road, was to haul the material from Saluda, a station on the Southern Railway, to the point of development, and no doubt this witness told the truth.

We insist that to permit a large wealthy corporation, whose principal object is to develop power to be used at the cotton mills of its owners, and for sale to other cotton mills, and manufacturing establishments, should not be permitted to take the property of a public service corporation, actively engaged in serving the public, under the guise of building a railroad from *one rock in the side of the mountain,—Saluda—to a water fall in a river, the dam site, along which no person lives.*

We further insist that taking all the testimony together, it plainly appears that if the judgment of the Courts of North Carolina stands, plaintiffs in error will have been deprived of their property, without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, because the property has been condemned for uses other than public uses, and that for these reasons, the Supreme Court of North Carolina erred in not sustaining said Exceptions Nos. One and Two, page 82 of the record.

ARGUMENT.

ON MOTION TO DISMISS.

The defendant in error insists that this writ of error should be dismissed, because no Federal question is involved. The statutes of North Carolina, under which this proceeding was brought, read as follows:

The first statute is Chap. 302 of the Laws of 1907, which was amended by Chap. 94 of the Laws of 1913; and this statute, with its amendment, reads as follows: "Where any street or interurban railway company owns lands on one or both sides of a stream, which can be used in developing a waterpower plant for the purpose of generating electricity to be used in operating such railway, then such railway company shall have the power to erect, maintain, and operate such waterpower plant, or plants, for such purpose, and may build, erect, maintain, and operate any and all dams, ponds, canals, bridges, ferries, aqueducts, flumes, water ways, wasteways, reservoirs, and all works, machinery, houses, shops and buildings necessary for the use and operation of a waterpower plant for generating electricity. And whenever such company shall not own the entire water front, or all of the lands, water rights, or other easements necessary to be used in fully developing such waterpower, then such railway company shall have the power to acquire any other lands, water rights, or easements, which may be needed to fully develop such waterpower, and if such company cannot agree with the owner or owners for the purchase of such lands, water rights or other easements, the same may be condemned, appropriated and taken by such railway company for that purpose, and the procedure shall be the same as that provided by chapter sixty-one of the Revisal of One Thousand Nine Hundred and Five, entitled 'Railroads,' and relating to the condemnation of lands for railroads: Provided, that no dwelling house, yard, garden, orchard, or burial ground shall be condemned for such purpose: provided, further, that such company or companies shall not have the power to condemn any waterpower, right or property of any person, firm or corporation engaged in the actual service of the general public, where such power right or property is being used or held to be developed for use in connection with or addition to any power actually used by such persons, firms or corporations serving the general public.

"(2) Any surplus power generated by any plant

erected under the provisions of this Act may be sold by such company upon reasonable terms (1907, c. 302; 1913, c. 94)."

The other act authorizing electric companies to exercise the right of eminent domain is found in Section 1573 of Pell's Revisal of 1908, Chapter 74, Laws of N. C., 1907, and is as follows:

"Such telegraph, telephone, electric power, or lighting company shall be entitled to the right-of-way upon making just compensation therefor; over the lands, privileges, and easements of other persons and corporations, and the right to erect poles and to establish offices, and to take such lands as may be necessary for the establishment of their reservoirs, ponds, dams, works, or power houses, and the right of way through all lands between their reservoirs, ponds, dams, works and power-houses, with the right to divert the water from such ponds or reservoirs, and conduct same by flume, ditch, conduit waterway, or pipe line, or in any manner to the point of use for the generation of power, at said power houses, returning said water to its proper channel after being so used: Provided, that the power given under this section shall not be used to interfere with any mill or power plant actually in process of construction, or in operation; and Provided, further, that waterpowers developed or undeveloped, with necessary land adjacent thereto for their development, shall not be taken; and that this section shall not authorize the taking of residence property, or vacant lots adjacent thereto, in towns, or cities, or other residence gardens, orchards, graveyards and cemeteries.

"Any provisions in any special charters heretofore granted in respect to the exercise of the right of eminent domain which are in conflict herewith are hereby repealed."

It is under the statute just above recited that the defendant in error sought to condemn the lands of the plaintiffs in error, upon the ground that the defendant in error, petitioner in the trial court, was a street or interurban railway company having the power to condemn lands and

water powers, and that the property of the plaintiffs in error was not included in the last provision of Section 1 of said statute, exempting water powers, rights and property of any corporation engaged in the actual service of the public, where such property is held for use or development in connection with the power in use.

Plaintiffs confidently insist that the construction of these statutes by the Supreme Court of North Carolina deprives them of their property without due process of law, because their property has been taken for a *non-public* use, and to enable defendant to *fully develop* its water power for private uses; that so much of this statute as pretends to authorize electric power companies to condemn land and water rights so as *"TO FULLY DEVELOP such water power"* when such full development is not shown to be for a public use or uses, is void.

FEDERAL QUESTIONS RAISED IN THE ANSWER.

An examination of the answer of the plaintiffs in error, record, p. 21, shows that they alleged in the trial Court, that the condemnation of their lands for the purposes set out in the record, would be the taking of private property, without due process of law, and in violation of the Fourteenth Amendment to the Constitution of the United States. Not only was this expressly alleged in the answer, but we insist that the Federal question was so necessarily involved in the decision of the trial Court and of the Supreme Court of North Carolina, that the decision arrived at could not have been had, without denying to the plaintiffs in error, the rights set up and claimed by them under the Constitution of the United States.

A motion to dismiss a writ of error to a State Court must be denied where the protection of the Fourteenth Amendment to the Constitution was invoked in the answer.

American Sugar Ref. Co. v. Louisiana, 179 U. S., 89, 91.

A writ of error to a State Court from the Supreme

Court will not be dismissed for want of jurisdiction, where a Federal question is clearly raised, merely because the claim by which it is presented is not well founded.

Blythe v. Hinkley, 180 U. S., 333, 337-338.

FEDERAL QUESTION NECESSARILY INVOLVED.

Where the jurisdictional facts appear "(1) Either by express averment or by necessary intendment in the pleadings of the case" this Court has held that it has jurisdiction.

Armstrong v. Athens County, 16 Pet., 284.

The particular provision of the Constitution which the plaintiffs in error say has been violated need not be contained in the pleadings, nor spread upon the record. It need not appear that the State Court erred in its judgment. It must appear that the question did arise, and it is sufficient that the question was decided adversely to the plaintiffs in error.

Hickie v. Stark 1st Pet., 96;
Furnam v. Nichol, 8 Wall, 44;
Bridge Proprs. v. Hoboken Land & Improvement Co., 1 Wall, 116;
Snell v. Adsit, 16 Wall, 185;
Clark v. Pa., 128 U. S., 395.

A judgment which rejects the claim set up under the Constitution of the United States, but avoids all reference to it, as appears from the opinion of the Court in this case, is as much against the right within the meaning of Section 709 of the Revised Statutes of the United States, as if it had been specifically referred to, and the right directly refused. And that a Federal question was not presented by counsel in the State Court or argued in their brief, is not sufficient reason for that court omitting to consider it. A refusal or failure to consider a Federal question is equivalent to a decision against the Federal right involved thereon.

Des Moines Navigation & R. Co. v. Iowa Homestead Co., 123 U. S., 555;
Erie R. R. Co. v. Purdy, 185 U. S., 148.

If it appear from the record, by clear and necessary intendment, that a Federal question must have been directly involved, so that the State could not have given judgment without deciding it, that will be sufficient to give jurisdiction.

Powell v. Brunswick County, 150 U. S., 433.

Where a party specially sets up and claims a right under the Constitution of the United States the sufficiency of the allegations to present that issue is not included by the issue of a state court thereon.

Covington & L. Turnpike Co. v. Sanford, 164 U. S., 595;
Mitchell v. Clark, 110 U. S., 645;
Boyd v. Nebraska, 143 U. S., 180;
Water Power Co. v. St. Ry. Co., 172 U. S., 475, 488.

"But where the validity of a treaty or statute of the United States is raised, and the decision is against it, or the validity of a state statute is drawn in question, and the decision is in favor of its validity, this court has repeatedly held that, if the Federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question here.

Miller v. Nicholls, 4 Wheat., 311;
Willson v. Blackbird Creek Marsh Co., 2 Pet., 245;
Satterlee v. Matthewson, 2 Pet., 380, 410;
Fisher's Lessee v. Cockrell, 5 Pet., 248;
Crowell v. Randell, 10 Pet., 368;
Harris v. Dennie, 3 Pet., 292;
Farney v. Towle, 1 Black, 350;
Hoyt v. Shelden, 1 Black., 518;
Railroad Co. v. Rock., 4 Wall, 177;
Furman v. Nichol, 8 Wall, 44;
Kaukauna Co. v. Green Bay & C. Canal, 142 U. S., 254.

It is not always necessary that the Federal question should appear affirmatively on the record or in the opinion. If an adjudication of such question was necessarily involved in the disposition of the case by the State Court.

Kaukauna Water Power Co. v. Green Bay and M. Canal Co., 142 U. S., 254.

In the last case cited it was decided that the State Court could not have reached a conclusion adverse to the plaintiffs in error, without holding that either none of its property had been taken, or that it was not entitled to compensation therefor, which is equivalent to saying that it had not been deprived of its property, without due process of law, and that a Federal question was thus presented, reviewable in the Supreme Court.

So that in this case the property of the plaintiffs in error has certainly been taken, and they insisted in the trial Court, and in the Supreme Court of the State, that the taking of their property, for the purposes set out in the record, would be depriving them of their property, without due process of law, and thus distinctly and plainly raising the Federal question.

Where the Constitutionality of a State Court is directly attacked in an answer, a Federal question has been so raised that a motion to dismiss will be denied.

Minneapolis and St. Louis R. Co. v. Minnesota, 193 U. S., page 53.

"It is true the law of the State as written is not attacked, but the law as administered and justified by the Supreme Court of the State is attacked, and it is asserted to be a violation of the Constitution of the United States. The question presented is Federal, and the motion to dismiss is denied."

Myles Salt Co. v. Iberia Drainage District 239 U. S., 478, 484.

It is respectfully submitted that under the law as above announced, a Federal question is clearly raised in this case.

In a case where the validity of the statutes, under the

Constitution of the United States, is necessarily drawn in question, and the decision of the State Court is in favor of its validity, the Supreme Court of the United States will take jurisdiction, though the Federal question be not specifically set up or claimed.

Yazoo & Mississippi Val. Ry. Co. v. Adams, 180 U. S., page 1.

"If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, the judgment which rejects the claim but avoids all reference to it as much against the right, within the meaning of Section 709 of the Revised Statutes as if it had been specifically referred to, and the right directly refused."

Chapman v. Goodman, 123 U. S., 540-548.

Where a Federal right was first set up in a petition to re-hear a case, which was considered by the State Supreme Court, a motion to dismiss will be denied.

Leigh v. Green, 193 U. S., 79.

Attention is here called to the fact that the Chief Justice of the Supreme Court of North Carolina, in his dissenting opinion set out on p. 107 of the record, distinctly states that Federal questions were involved and considered by the Supreme Court of North Carolina, and states four grounds upon which such contention was made.

Upon the foregoing statement and authorities we insist that the motion to dismiss should be denied.

ON MOTION TO AFFIRM.

The plaintiffs in error insist that this motion should be denied for the following reasons:

I.

NO NECESSITY TO CONDEMN.

It appears from the record that there was no allegation in the petition in the trial court that it *was necessary to*

condemn the property of the plaintiffs in error in order *to operate the railroad* proposed to be built, record, pp. 14 to 16. There is no evidence in the record tending to show that it was necessary to condemn the plaintiffs property to operate the railroad, but the evidence, on the other hand, was directly to the contrary as has been hereinbefore set out, and that there was no finding by the trial court that it was necessary to condemn the property of the plaintiffs in error, in order to operate the railroad, but the finding of the necessity to condemn is based on the idea, record, p. 22 that "*it is necessary in order to fully develop petitioners alleged water power on Green River for the purposes alleged in its petition, to condemn the rights described in the petition.*"

Where there is no necessity to condemn the courts will withhold the right to condemn.

Curtis on the Laws of Electricity, Section 81;
State v. White River Power Co., 39th Wash., 648;
2 L. R. A. (N. S.) 842.

So, we insist that in this case there is no necessity to condemn the property of the plaintiffs in error. Attention of the Court is again called to the fact that according to this record, the real object of the defendant in error is to develop a large water power, to supply electric current for the private uses of the mills and properties owned by the stockholders of the defendant in error, and in which they are interested.

II.

CONDEMNATION IS NOT SOUGHT SOLELY FOR PUBLIC PURPOSES.

We wish here to call the particular attention of the Court to the fact that a careful reading of the petition in this case, pages 14 to 16, and particularly a study of the testimony will show that it is not the purpose of the defendant in error, to condemn solely for public uses. There is neither, allegation, proof nor finding that the

electric current proposed to be produced, is to be sold, generally, for public uses, and the case, therefore does not come, as we insist, under the ruling of this court in the case of Mt. Vernon Woodbury Cotton Co. v. Alabama Power Co., 240 U. S., 30.

In the last case it was stated by the Court that "the purpose of a power company's incorporation, and that for which it seeks to condemn property of the property of the plaintiff in error, is to manufacture, supply and sell to the public, power produced by water as a motive force." We insist that the present case is entirely different from that just referred to.

It has been held, and in fact universally, held that where a company having the power of eminent domain, seeks to condemn property, both for public and private uses, its petition will be denied.

As a general proposition it may be stated without hesitancy, that private property cannot be taken for anything other than a public purpose. It may also be stated, as we think, that where the charter of the corporation authorizes it to exercise the power of eminent domain for both public and private purposes, the power of eminent domain cannot be exercised for the private purpose, but it may be exercised for the public purpose.

Kaukauna Co. v. Green Bay &c. Canal Company, 142 U. S., 254;

Walker v. Shasta Power Co., 160 Fed., 856.

Where both private purposes and public uses are contemplated in the articles of incorporation, the question whether the right to condemn is to be denied or withheld is not tested solely by the objects and purposes set forth in the articles of incorporation, but may be governed by evidence aliunde showing the actual purpose in view.

Lake Koen Nav. I. & R. Co. v. Klein, 63 Kans., 484, 65 Pacific, 548;

Cole v. Co. Commissioners, 78 Ne., 532; 7th Atl., 397;

Brown v. Gerald, 100 Me., 351; 61 Atl., 785.

In

Foldsberg Power and Mfg. Co. v. Alexander, 101 Va., 98; 43 S. E., 194; 61 L. R. A., 129,

the corporation was empowered by the General Assembly to generate electric and water power, light or heat, and utilize and transmit and distribute the same to any place or places for its own use or for the use of other individuals and corporations. The Company proceeded to condemn lands and water rights "for the Company's use or for the use of other individuals or corporations." The Court held: "In such a case the private benefit too clearly dominate the public necessity to find constitutional authority for the exercise of the power of eminent domain, and it is the equivalent of taking private property for private uses."

So, in

Berian Springs Water Power Co. v. Berien Circuit Judge, 133 Mich., 48; 94 N. W., 379; 103 Am. St. Rep., 438,

the condemnation suit was brought under an Act which authorized the corporation to acquire water rights and water for private and public purposes. In the petition for condemnation, it was alleged that the Company acquired lands "for the purposes of its incorporation, and that the taking thereof is necessary for the public use and benefit." The Court denied the right to condemn, saying: "After the water power is erected, though it may be used for a public purpose, relator has the option to use it entirely for private purposes." See also

Attorney General v. Eauclaire, 37 Wis., 400;
State ex rel. Harris, v. Superior Court, 42 Wash., 660; 85 Pacific 666; 5 L. R. A. (N. S.), 672.

This last case is very much in point. There the testimony was to the effect that the condemnation was sought for the purpose of obtaining additional power not only for use in operating the light plant and electric car system, but for the purpose of selling power to the different manufactories and for different purposes. The Court

held that the petitioner was not authorized to exercise the right of eminent domain for these purposes since the use was not a public one. In the case of

Matter of Niagara Falls and Whirlpool Ry. Co., 108 N. Y., 375,

it is held, among other things, that where the charter of the corporation seeking to condemn land authorized it to build a railroad for public use for the transportation of persons and property, and the petition alleged it to be the purpose of the company to build a railroad for the transportation of persons and property; that the evidence showed that the object of the proposed railroad was to convey visitors along the Niagara River to view the scenery during the summer months, and that there was no freight to be hauled and that no business could be done except during the summer months, the purpose was not a public purpose but a private one, and the right to condemn was denied. The Court in this case decided that although the charter and the petition of the corporation showed that the purpose of the Company was to take property for a public use, still, when the court looked at the actual business proposed to be conducted, as shown from the testimony, it was a pvirate use and not a public one for which the property was proposed to be condemned.

If a private use is combined with a public one in such a way that the two cannot be separated, then unquestionably the right of eminent domain could not be invoked to aid in the enterprise.

State ex rel. Harland v. Centralia-Cheshalis Electric Railroad and Power Co., 42 Wash., 632; 4th St. Ry. Reports, 1064; 86 Pac. 344.

The question to be determined in every case is whether or not a corporation seeking to acquire land by condemnation, proposes to use the same for public or private end.

Great Falls Power Co. v. Webb, 123 Tenn., 584; 133 S. W., 1105.

Where a separation of the public purposes from the private purposes is not sought or where the same is deemed

impossible, the electric company should not be permitted to condemn the lands.

Webster v. Susquehanna Pole Lime Co., 112 Md., 416; 76 Atl. 254; 21 Am. Cas., 357;
Miller v. Town of Pulaski, 109 Va., 137; 63 S. E., 880; 22 L. R. A. (N. S.), 552;
City of Tacoma v Nisqually Power Co., 57 Wash., 420; 107 Pac., 199.

In this last case the Court says: "A proceeding to condemn land under the power of eminent domain cannot be maintained unless the use to which the property is to be devoted is exclusively a public use. The mere fact that the corporation has charter authority to condemn land for both corporate and private uses will not prevent the corporation from exercising the power for the promotion of the public use only. * * * But, where a proceeding is instituted in which it is sought to exercise the power to condemn property for both public and private uses indiscriminately,—that is, where the purposes stated in the petition are part public and part private,—the right to proceed must be denied."

See also

Minnesota Canal & Power Co. v. Koochiching Co. 97 Minn. 429; 107 N. W. 405; 5 L. R. A. (N S.) 638.
Curtis Law of Electricity, Section 67.

The author states that, " A corporation should be permitted to condemn lands for the public purposes mentioned in its charter where it does not seek to engage in the private purposes or where the land sought is not to be used for such private purposes. This statement of the doctrine implies the possibility of separating the company's public purposes from those of a private nature. Where such a separation is not sought or is deemed impossible, the electric company should not be permitted to condemn the lands. Where the court is unable to detach the private use of the land desired from the public use which might be condemned, the constitutional provision comes into full force

and forbids the taking. * * * * If no attempt is made by the corporation to separate the public from the private purposes, but it boldly comes into court asking condemnation for both, it can have no relief."

Fallsberg Power Mfg Co. v. Alexander, (Va) 61 L. R. A. 129.

In this case a company's charter authorized it to engage in both public and private businesses. A proceeding was brought for the purpose of acquiring so much of the lands of the defendants "as may be needed for the purposes of the Company." "The purpose is to acquire by condemnation so much of the lands and water rights of defendants in error as may be needed by the Company to enable it to locate and establish its plant, or plants, for the manufacture and generation of water power, electrical power, or water power, light, or heat, to be utilized, transmitted, and distributed to any place or places for the company's use or for the use of other individuals or corporations." The Court states that the question to be considered is the constitutional authority of the Legislature to confer upon a corporation the right of eminent domain to acquire a site for a plant to generate water power, electrical power, or water power, light or heat, and utilize, transmit and distribute such power, light or heat to any place or places, for the corporation's own use or for the use of other individuals or corporations. In the course of the opinion the Court says: "The general public must have a definite and fixed use of the property to be condemned; a use independent of the will of the private person or private corporation in whom the title of property when condemned will be vested; a public use, which cannot be defeated by such private owner, but which public use continues to be guarded and controlled by the general public through laws passed by the legislature. Second. This public use must be clearly a needful one for the public, one which cannot be given up without obvious general loss and inconvenience. Third. It must be impossible, or very difficult at least, to secure the same public uses and purposes otherwise than by authorizing the condemnation

of private property. * * * The use which the public is to have of such property must be fixed and definite. The general public must have a right to a certain definite use of the property on terms and for charges fixed by law, and the owner of the property must be compelled by law to permit the general public to enjoy it. It will not suffice that the general prosperity of the community is promoted by the taking of private property from the owner and transferring its title and control to a corporation, to be used by such corporation as its private property, uncontrolled by law as to its use. In other words, a use is private so long as the land is to remain under private ownership and control, and no right to its use or to direct its management is conferred upon the public."

"Lewis, Em. Dom. PP. 165, in discussing the meaning of the term 'public use', and, referring to the provision usually inserted in state constitutions on the subject, says: 'Public use' means the same as 'use by the public', and this it seems to us, is the construction the words should receive in the constitutional provision in question. The reasons which incline us to this view are: First, that it accords with the primary and more commonly understood meaning of the words; second, it accords with the general practice in regard to taking private property for public use in vogue when the phrase was first brought into use in the earlier constitutions; third, it is the only view which gives the words any force as a limitation, or renders them capable of any definite and practical application.' In a note to this text it is said: 'The test whether a use is public or not is whether a public trust is imposed upon the property; whether the public has a legal right to the use, which cannot be gainsaid or denied or withdrawn at pleasure of the owner.'' ''The public use implies a possession, occupation, and enjoyment of the land by the public at large or by public agencies; and a due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from the more profitable use to which the later may devote it.' * * The difficulty with the charter is,

that the purpose for which the property is authorized to be taken by the right of eminent domain in this instance does not clearly appear to be for a public use or a public purpose. On the contrary, the grounds of public benefit upon which the taking is proposed are vague, and the use which the public is to have of the property, or how the public is to be benefitted by the use of it by the company, is by no means fixed and definite. Not only is the public benefit to spring from the use to which the company proposes to devote the property vague, indefinite, and uncertain, but, under the plain language of the charter, the public use of the property, or any use of it by the public, may be gainsaid or denied or withdrawn by the company at its will, since it is authorized to use, not only a part, but the entire product of the work or words it proposes to establish, for its own use or benefit. In such a case the private benefit too clearly dominates the public interest to find constitutional authority for the exercise of the power of eminent domain, and is the equivalent of taking of private property for a private use, against the will of the owner, which cannot be done in any case.

State v. White River Power Co., 29 Wash. 648, 4 Am. and Eng. Ann. Cases, 987.

The Court in this case decides that the taking of land by a corporation organized as a water power company and electric power company for the purpose of creating a water power to generate electricity to be transmitted to neighboring cities and places to be sold for the use of the public in municipal and public lighting the operation of street railways and other railways, manufactories, private lighting and heating, is not a taking for a public use and it is not a legitimate exercise of eminent domain. The Court defines with clearness a public use as distinguished from a private purpose and holds that where the purpose of the proceeding are both public and private the right to condemn will be denied.

"This is equally true of the respondent company. It is not claimed that there is a present demand for the 50,000 electrical horse power. It is not claimed that the

respondent has a franchise to enter any of the cities or towns mentioned, or that it will or can obtain one. It does not appear that there are any street or other railways to utilize its product. It is not under contract or obligation to furnish electricity to any person, or for any purpose. Under its articles it may erect and maintain mills and manufactories and operate the same. For aught that appears, aside from its professions and voluntary promises, it may take the relator's property, generate electricity or not, at will, and use the same for any purpose, public or private, to suit its convenience. * * * The use which the public is to have of such property must be fixed and definite. The general public must have a right to a certain definite use of the private property on terms and for charges fixed by law, and the owner of the property must be compelled by law to permit the general public to enjoy it. It will not suffice that the general properity of the community is promoted by the taking of private property from the owner and transferring its title and control to a corporation, to be used by such corporation as its private property, uncontrolled by law as to its use; in other words, a use is private so long as the land is to remain under private ownership and control, and no right to its use or to direct its management is conferred upon the public. * * * 'The use of the waters of this state for irrigation, mining, and manufacturing purposes shall be deemed a public use.' We are not called upon, at this time, to determine the full import or meaning of this constitutional provision. What we have already said disposes of the question before us. If it was intended by the article in question to extend the right of eminent domain to private manufacturing corporations, or to authorize the taking of private property for a private use, it violates the due process clause of the Federal Constitution. A state is powerless, by statute or by constitutional provision, to declare a use public which is essentially and inherently private."

In Kaukauna Water Power Co. v. Green Bay, etc. Canal Co., 142 U. S. 254, 12 U. S. Sup. Ct. Rep. 173, U. S. (L. ed.) 1004, the court said:

" 'The improvement of the navigation of a river is a public purpose, and the sequestration or appropriation of land or other property, therefor, for such purpose, is doubtless a proper exercise of the authority of the state under its power of eminent domain. Upon the other hand, it is probably true that it is beyond the competency of the state to appropriate to itself the property of individuals for the sole purpose of creating a water power to be leased for manufacturing purposes. This would be a case of taking the property of one man for the benefit of another, which is not a constitutional exercise of the right of eminent domain."

"This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was in essence, and effect, a taking of private property of the railroad corporation, for the private use of the petitioners. The taking by a stake of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States.' "

From a full review of all the authorities, we are convinced that the respondent is not a public service corporation, and that the use to which it intends to apply the property it now seeks to acquire is not a public service corporation, and that the use to which it intends to apply the property it now seeks to acquire is not a public use, within the meaning of the constitution and laws of this state."

See also.

State ex rel. Harris, v. Superior Court, 42 Wash. 660, 7th Am. Eng. Ann., Cases, 748.

Minn. Canal Co. v. Koochiching Co., 97 Minn., 429, 7 Am. and Eng. Ann. Cases, 1182.

The purposes of the corporation in this case are stated by the court as follows:

"(1) To create a water power and to construct, create, and maintain a water-power plant at West Duluth by which to (a) supply water power from the wheels thereof, and (b) generate and distribute electricity for light, heat, and power purposes, (2) to construct and maintain a canal, canals, or waterways on which to operate canal barges, and to be otherwise used for purposes of navigation. The trial court found that 'said canals and waterways, and the said water and water power, and the said electricity are to be for the use of all municipalities, corporations, and persons who shall desire to use the same, and to be furnished by the petitioner as demand may develop to all such municipalities, corporations, and persons.'"

In discussing the case the court says:

"In these days of enormous property aggregation where the power of eminent domain is pressed to such an extent, and where the urgency of the so-called public improvements rests as a constant menace upon the sacredness of private property, no duty is more imperative than that of the strict enforcement of these constitutional provisions intended to protect every man in the possession of his own. * * * A legislative act which takes or undertakes to authorize the taking of private property for a private object, either by taxation or by the exercise of the power of eminent domain, or by any other means, is not a law, but an arbitrary decree whereby the property of one citizen may be transferred to another. Such an act is beyond the limits of the powers granted by the people to the legislatures of the states, and is without legal force or effect. The legislative power of taxation and power of eminent domain are alike limited to the exercise thereof for public objects, and they cannot be successfully prostituted for private purposes. * * * A corporation which asserts the right, under a delegation of power from the state, to take private property against the will of the owner, must show affirmatively that it has been granted the power for the specific purpose, and that its purposes to use the property, when it has been acquired, for the public use and not for private benefit.

"Whether a certain use is public or private is a judicial and not a legislative question. Stewart v. Great Northern R. Co., 65 Minn. 515, 68 N. W. Rep. 208, 33 L. R. A., 427; Fairchild b. St. Paul, 46 Minn. 540, 49 N. W. Rep. 325. The Legislature cannot by its mere fiat make a private use a public one. It follows that a statute which attempts to authorize the condemnation of private property for other than a public use is void without reference to any legislative declaration as to the nature of the use. * * * Courts determine what is a public use; legislatures, when the power of eminent domain may be exercised in its promotion. Courts may not interfere to limit or control the discretion of the lawmaking power as to the character, quality, method, or extent of the exercise of the power of eminent domain by private person or corporation engaged in the promotion of a public use, when once it has been determined that such use is a public use."

"A proceeding to condemn land under the power of eminent domain cannot be maintained unless the use to which the property is to be devoted is exclusively a public use. The mere fact that the corporation has charter authority to condemn land for both corporate and private uses will not prevent the corporation from exercising the power for the promotion of the public use only. * * * But where a proceeding is instituted in which it is sought to exercise the power to condemn property for both public and private uses indiscriminately—that is, where the purposes stated in the petition are part public and part private, the right to proceed must be denied. * * * The sawmill and paper mill have no public character; the erection of these mills would be wholly for the prviate use of these petitioners. * * * Had the application been confined to the sawmill and the paper mill, no one could for a moment hesitate in rejecting it. Does the introduction of the gristmill, thereby asking the land for these complicated purposes, alter the case? In my opinion the application is entitled to no more favor than if nothing was said about the gristmill. If an application of this sort were granted, a like application for the erection of

iron works, or other establishment requiring water power, might be made, and would be entitled to equal favor, provided the applicant, as a pretext, were to associate a gristmill with his other works. Thus the gristmill, the only thing mentioned in the act of assembly as having any claim to be of a public character, would be made the subterfuge for vesting in one citizen the land of another, and of giving to the whole establishment, of which it would be but an inconsiderable appendage, the high appellation of a public mill. This would be mocking the citizen, who would thus be despoiled of his land to enrich another."

"We do not desire to be understood by this decision," said Justice Peckham, "as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the state. Under normal conditions, the distinction must be made between a use which is public and the interest which is public. Where there is simply a public interest, as distinguished from a public use, the power of eminent domain cannot be exercised. The mere fact that the interest is of a public nature, and that the use tends incidentally to benefit the public in some collateral way, confers no right to take private property in invitum.

"The appellant proposes to create a water power plant and to supply water power from the wheels thereof, and to generate heat and electricity for heat, lighting, and power purposes. Here are two distinct purposes and uses to which it proposes to put the respondents' property, and, as we have already found, it is necessary that both should be public uses. Granting that the owner of eminent domain may be used to aid in creating power, to be sold to all who desire it under reasonable conditions, and at prices subject to the control and regulation of the state, it is apparent that the nature of the use must be determined by the character of the power and the physical conditions under which it is to be produced and sold."

J. R. Miller v. Pulaski, 63 S. E., 880 (Va.) 228 L. R. A. (N. S.) 552.

In the case of Miller of Pulaski the previous Virginia cases are reviewed and the Court holds that a town may be authorized to condemn land for public purposes, and then says:

"It confers the power upon the town to acquire the property rights in controversy here not only for the purpose of supplying the inhabitants of the town, but 'other persons, companies, or corporations,' with electric lights and power. Now, if the grant of power had been to the town of Pulaski to condemn property for the sole purpose of furnishing power to persons, companies, or corporations other than the inhabitants of the town itself, it clearly would not have been a public use, and would come within the condemnation of Fallsburg Power & Mfg. Co. v. Alexander, supra; * * * 'If a private use is combined with a public use in such a way that the two cannot be separated, the whole act is void. Thus, an act which authorized the erection of a dam across a navigable river by a city, either for the purpose of waterworks for the city or for the purpose of leasing the water for private use, was held void.'

" 'We held in the former case, Atty. Gen. v. Eau Claire, supra, that the statute then before us * * * authorized the erection of a dam at public cost across a navigable river, either for the purpose of waterworks for the city or for the purpose of leasing the water power for private purposes, and that so the power was alternative and optional, either for a public or a private use, and therefore void. Since that decision, and obviously in view of it, the legislature has amended the statute. * * * And the amendment so clearly and emphatically makes the power to construct the dam dependent on the power to construct water works, and limits the power to lease the water power to the excess not required for the water works, as to place the power beyond criticism, in that respect.' "

"We cannot suppress the grant of the power to condemn for private purposes and maintain the act so far as it authorizes a condemnation for a public use, because we cannot undertake to say that the vote which the act as a

whole received in the legislature, and which was necessary to its passage under the Constitution—that is to say two-thirds of the members elected to each house—was not influenced by the fact that the statute carried with it authority to supply with electric power not only the inhabitants of the town, but other persons, companies, or corporations. To maintain such an act would be to establish a precedent capable of great abuse, if individuals and corporations, under cover of the public use, could under such circumstances avail themselves of the grant of power to a municipal corporation."

For the reasons hereinbefore particularly and fully set out, the plaintiffs in error, respectfully ask this Honorable Court, to deny each and every of the motions of the defendant in error, because it plainly appears from the record that a Federal question was set up in the answer of the plaintiffs in error in the trial court, record, p. 21, paragraph six. And further that a Federal question was actually involved, considered and decided by the Supreme Court of the State of North Carolina, record, p. 107, and that such question was necessarily involved in the decision rendered by the State Court, and that to permit the defendant in error to take the property of the plaintiffs in error, under this proceeding, would be a violation of the Constitution of the United States, since said property is taken when not necessary for the public utility mentioned in the record, and is also taken for private uses, contrary to the Constitution of the United States, and especially the Fourteenth Amendment thereof.

This the 24th day of February, 1917.

MICHAEL SCHENCK,
Hendersonville, N. C.
C. P. SANDERS,
Spartanburg, S. C.
J. C. MARTIN,
THOMAS S. ROLLINS,
GEORGE H. WRIGHT,
Asheville, N. C.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. 497

HENDERSONVILLE LIGHT AND POWER COMPANY AND SALUDA-HENDERSONVILLE INTERURBAN RAILWAY COMPANY, Plaintiffs in Error v. BLUE RIDGE INTERURBAN RAILWAY COMPANY, Defendant in Error	In error to the Supreme Court of the State of North Carolina

BRIEF OF ATTORNEYS FOR THE BLUE RIDGE INTERURBAN RAILWAY COMPANY, DEFENDANT IN ERROR.

HORACE L. BOMAR
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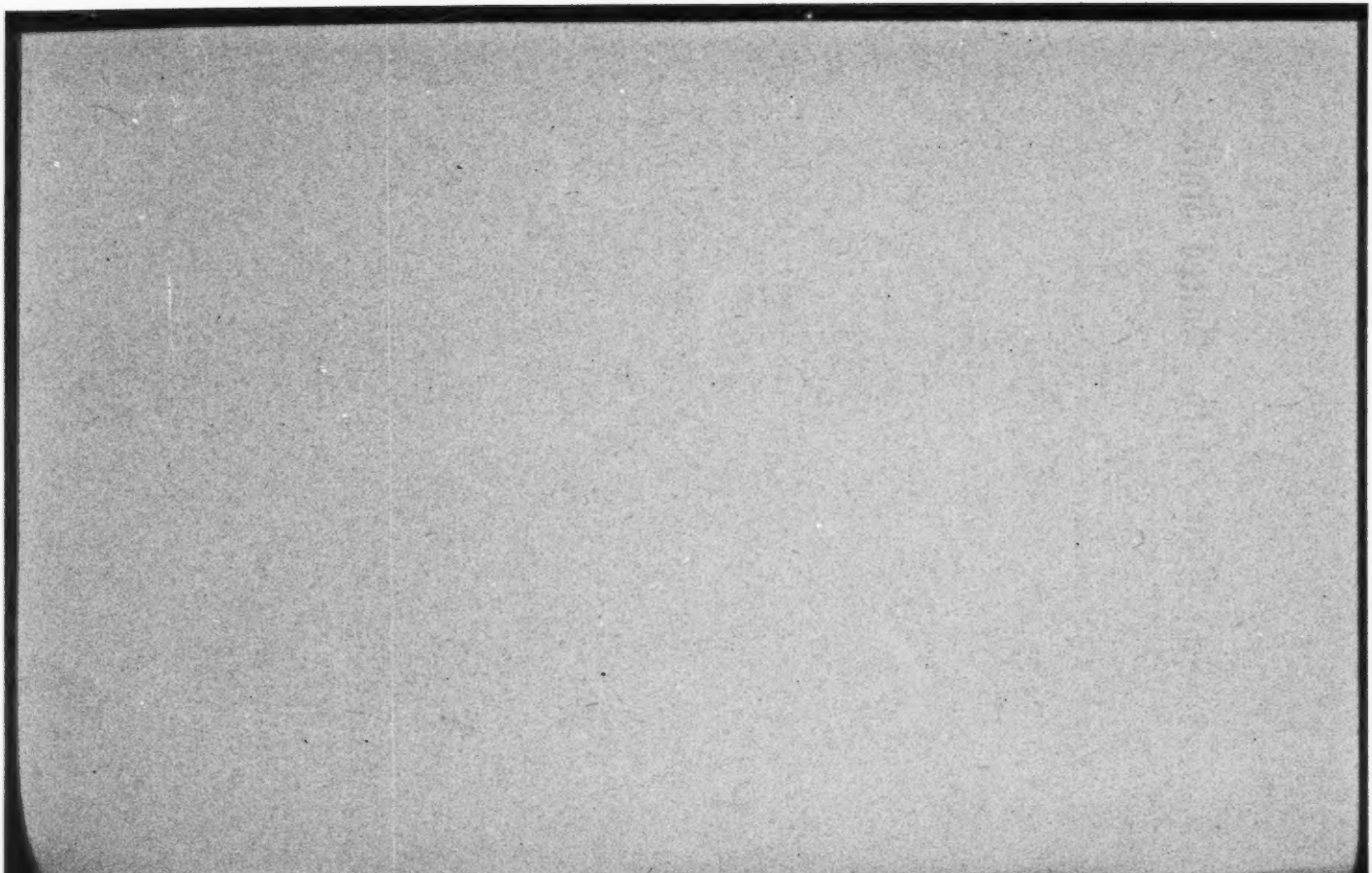
OBSERVER PRINTING HOUSE, CHARLOTTE, N. C.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1916

No.

HENDERSONVILLE LIGHT AND POWER COMPANY AND SALUDA-HENDERSONVILLE INTERURBAN RAILWAY COMPANY
Plaintiffs in Error
v.
BLUE RIDGE INTERURBAN RAILWAY COMPANY
Defendant in Error

NOTICE OF MOTION

To Messrs. Michael Schenck, Julius C. Martin, Thomas S. Rollins, and George H. Wright, Attorneys for Plaintiffs in Error:

You are hereby notified that on Monday, the fifth day of March, 1917, at the opening of the Court on that date, the undersigned attorneys for defendant in error in the above entitled case, will make, before said Supreme Court of the United States, in the courtroom at Washington, a motion on behalf of the defendant in error, *first,* to dismiss the writ of error herein, on the ground that the Supreme Court of the United States has not jurisdiction thereof, no Federal question being involved therein, especially none which was properly raised and preserved; or, *second,* to affirm the judgment of the Supreme Court of the State of North Carolina, on the ground that it is manifest that this writ of error was taken for delay only, and that the contentions of the plaintiffs in error in this case are so entirely without merit as not to

need further argument; or, *third*, to transfer this cause for hearing to the summary docket, if this Court should refuse to dismiss or affirm, for that the points involved in the case are of such a character as not to justify extended argument, for that the prosecution of this writ of error by the plaintiffs in error is delaying a large public improvement, and for that additional reason it is respectfully asked that the case be disposed of as speedily as possible; and the undersigned then and there will file in support of said motion a printed statement and argument, copy of which is hereto attached and delivered to you.

This third day of February, 1917.

HORACE L. BOMAR
SMITH & SHIPMAN
CHARLES W. TILLETT
THOMAS C. GUTHRIE
Attorneys for Defendant in Error

Received a copy of the foregoing notice, and the motion, statement, and argument therein referred to, this, the fifth day of February, 1917; and other and further service hereby waived.

MICHAEL SCHENCK
JULIUS C. MARTIN
THOS. J. ROLLINS
GEO. H. WRIGHT
Attorneys for Plaintiffs in Error

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1916

No.

HENDERSONVILLE LIGHT AND POWER COMPANY AND SALUDA-HENDERSONVILLE INTERURBAN RAILWAY COMPANY Plaintiffs in Error v. BLUE RIDGE INTERURBAN RAILWAY COMPANY Defendant in Error	Writ of Error to the Supreme Court of the State of North Carolina

MOTION TO DISMISS WRIT OF ERROR, OR AFFIRM JUDGMENT, OR TRANSFER TO THE SUMMARY DOCKET, WITH STATEMENT AND ARGUMENT OF DEFENDANT IN ERROR IN SUPPORT THEREOF.

MOTION TO DISMISS WRIT OF ERROR, OR AFFIRM JUDGMENT, OR TRANSFER TO THE SUMMARY DOCKET

And now comes defendant in error, by its attorneys of record herein, and moves this Honorable Court:

First: To dismiss the writ of error herein on the ground that this Court has not jurisdiction thereof, no Federal question being involved therein, especially none which was properly raised and preserved; or,

Second: To affirm the judgment and decision of the Supreme Court of the State of North Carolina, on the ground that it is manifest that this writ of error

was taken for delay only, and that the contentions of the plaintiffs in error in this case are so entirely without merit as not to need further argument; or,

Third: To transfer this cause for hearing to the summary docket, if this Court should refuse to dismiss or affirm, for that the points involved in the case are of such a character as not to justify extended argument, for that the prosecution of this writ of error by the plaintiffs in error is delaying a large public improvement, and for that additional reason it is respectfully asked that the case be disposed of as speedily as possible.

HORACE L. BOMAR
SMITH & SHIPMAN
CHARLES W. TILLETT
THOMAS C. GUTHRIE
Attorneys for Defendant in Error

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916

No. 497

HENDERSONVILLE LIGHT AND POWER COMPANY AND SALUDA-HENDERSONVILLE INTERURBAN RAILWAY COMPANY, Plaintiffs in Error v. BLUE RIDGE INTERURBAN RAILWAY COMPANY, Defendant in Error	In Error to the Supreme Court of the State of North Carolina

BRIEF OF ATTORNEYS FOR THE BLUE RIDGE INTERURBAN RAILWAY COMPANY, DEFENDANT IN ERROR.

It is respectfully submitted that a merely cursory examination into the nature of this proceeding, the statute law of North Carolina upon which it is founded, the disposition made of the case in the Superior Court of the State, and the final judgment and opinion of the Supreme Court of the State, will convince this Court that there really is no Federal question involved; or, if there is a Federal question, it comes into the case in a technical way, and therefore this Court should not hesitate either to dismiss the writ or to affirm the judgment.

In this connection, we respectfully call the attention of the Court to the fact that the Blue Ridge Interurban Railway Company, the defendant in error, is engaged in an effort to construct a large waterpower development, and that its further efforts are held up pending the decision of this Honorable Court upon

this Writ of Error, and this fact is an additional reason why the Court should dismiss the Writ of Error or affirm the judgment forthwith, if the Court shall reach the conclusion that there is no Federal question involved worthy of consideration; but, if the Court sees fit to hear the matter further, that the case should be transferred to the summary docket, because it is not a case of such character as to justify extended argument in any event, and as the Writ of Error is delaying a large public improvement the case should be speedily disposed of.

Nature of the Proceeding

This is what is termed in North Carolina a special proceeding, brought originally before the Clerk of the Superior Court of Henderson County by the Blue Ridge Interurban Railway Company (hereinafter called the Blue Ridge Company), against the Hendersonville Light and Power Company (hereinafter called the Hendersonville Company) and the Saluda-Hendersonville Interurban Railway Company (hereinafter called the Saluda Company), and the purpose of the proceeding is to acquire by condemnation the right to divert the waters of a stream known as Green River. The Court below granted judgment, which was affirmed by the Supreme Court to the effect that, upon the payment of the amount of damages assessed by the jury, ten thousand dollars, the Blue Ridge Company should be permitted to divert the waters of the stream by means of a dam erected *above* the lands of the Hendersonville and Saludá Companies, and by means of a steel flume convey the water from the dam to a power-house to be located *below* the lands of the Hendersonville and Saluda Companies. In this way the water will be diverted away from its present

channel, where it is a boundary line of the lands of the Hendersonville and Saluda Companies.

Special attention is here called to the fact that the Hendersonville and Saluda Companies do not own, or claim to own, the entire river bed, but they only own to the center or thread of the stream along that portion of the river where it is proposed to divert the water.

Attention is also called to the fact that the Blue Ridge Company owns on both sides of the river above the proposed dam, down the river, and below the proposed power-house, except the portion of the river where it bounds the lands of the Hendersonville and Saluda Companies, and along this part of the river the Hendersonville Company owns to the center or thread of the stream.

In order to give the Court a clear conception of the waterpower development proposed by the Blue Ridge Company, and show how the proposed development affects the rights of the Hendersonville and Saluda Companies, we have prepared and attached hereto a diagram, illustrating the proposed development, and showing how the lands of the parties are situate. There has been no attempt to present a map made from a survey giving courses and distances, but the diagram does show correctly the *relative situation* of the river and the lands of the parties, and the location of the proposed dam and power-house. We have also appended, on the opposite page from the diagram, an explanation, which we hope will enable the Court, after a few minutes' consideration, to gain a knowledge of the situation, so as more clearly to understand the points in the case. (See diagram, next page.)

The Saluda Company was the owner of the land which is affected by the condemnation proceedings, and conveyed it to the Hendersonville Company, and the latter Company executed back a mortgage for practically the entire purchase money. While we are of the opinion that under the peculiar terms of this mortgage the Hendersonville Company has really no substantial rights in the property, yet for the purpose of this appeal we will treat the Hendersonville Company as the owner of the land, so as to consider the matter in the strongest light for the Hendersonville Company.

The Hendersonville Company was at the beginning of the proceeding, and still is, the owner of a waterpower development on one of the tributaries of Green River, *above* the proposed dam. It is not the purpose of this proceeding, and it is not contended that this proceeding will in any way affect the waterpower development now owned and used by the Hendersonville Company in supplying its customers; but it is contended by the Hendersonville Company that, inasmuch as it owns to the middle of the stream on the tract of land *below* the proposed dam of the Blue Ridge Company, it has the right to utilize the waters of one-half the stream as a waterpower which it proposes to develop and use in addition to and in connection with the waterpower development which it is now using.

Practically the only point submitted to the Supreme Court of the State was as to whether one riparian owner who owned merely to the middle or thread of a stream had, by virtue of this ownership, the right to take out of the stream one-half of the waters and

develop this into a waterpower. This will be presented a little more clearly to the Court later on in the brief.

Statute Law upon Which Proceeding Is Founded

The method of exercising the right of eminent domain and acquiring by condemnation rights which could not be purchased was first granted in North Carolina to railroad companies, and these rights of condemnation will be found set forth in Chap. 61 of The Revisal of 1905, where the procedure in such cases is set forth and defined. It is not deemed necessary here to set forth the provisions of this Chapter, but we do wish to bring to the attention of the Court, the statutes under which the Blue Ridge Interurban Railway Company claims it is entitled to acquire by condemnation the right to divert the waters of the stream in the manner proposed.

The Blue Ridge Interurban Railway Company, defendant in error, is a corporation organized pursuant to the general statute permitting the organization of corporations for the purpose of constructing and operating street railways, interurban railways, and also electric power plants for generating and selling electricity.

There are two statutes under which these companies have the power to acquire by condemnation the right to divert the waters of streams, provided this is needed in the development of the waterpower.

The first statute is Chap. 302 of the Laws of 1907, which was amended by Chap. 94 of the Laws of 1913, and this statute, with its amendment, reads as follows:

"Where any street or interurban railway company owns land on one or both sides of a stream, which can be used in developing a waterpower plant for the purpose of generating electricity to be used in operating such railway, then such railway company shall have the power to erect, maintain, and operate such waterpower plant, or plants, for such purpose, and may build, erect, maintain, and operate any and all dams, ponds, canals, bridges, ferries, aqueducts, flumes, waterways, wasteways, reservoirs, and all works, machinery, houses, shops, and buildings necessary for the use and operation of a waterpower plant for generating electricity. And whenever such company shall not own the entire water front, or all of the lands, water rights, or other easements necessary to be used in fully developing such waterpower, then such railway company shall have the power to acquire any other lands, water rights, or easements which may be needed to fully develop such waterpower, and if such company cannot agree with the owner or owners for the purchase of such lands, water rights, or other easements, the same may be condemned, appropriated, and taken by such railway company for that purpose, and the procedure shall be the same as that provided by chapter sixty-one of the Revisal of one thousand nine hundred and five, entitled 'Railroads,' and relating to the condemnation of lands for railroads: PROVIDED, that no dwelling-house, yard, garden, orchard, or burial-ground shall be condemned for such purpose; PROVIDED, further, that such company or companies shall not have the power to condemn any waterpower, right, or property of any person, firm, or corporation engaged in the actual service of the general public, where such power right or property is being used or held to be developed for

use in connection with or addition to any power actually used by such persons, firms, or corporations serving the general public.

"(2) Any surplus power generated by any plant erected under the provisions of this Act may be sold by such company upon reasonable terms. (1907, c. 302; 1913, c. 94.)"

The other Act authorizing electric companies to exercise the right of eminent domain is found in Section 1573 of Pell's Revisal of 1908, and is as follows:

"Such telegraph, telephone, electric power, or lighting company shall be entitled to the right-of-way upon making just compensation therefor, over the lands, privileges, and easements of other persons and corporations, and the right to erect poles and to establish offices, and to take such lands as may be necessary for the establishment of their reservoirs, ponds, dams, works, or power-houses, and the right-of-way through all lands between their reservoirs, ponds, dams, works, and power-houses, with the right to divert the water from such ponds or reservoirs, and conduct same, by flume, ditch, conduit, waterway, or pipe line, or in any manner, to the point of use for the generation of power, at said power-houses, returning said water to its proper channel after being so used: PROVIDED, that the power given under this section shall not be used to interfere with any mill or power-plant actually in process of construction, or in operation; and Provided, further, that waterpowers, developed or undeveloped, with necessary lands adjacent thereto for their development, shall not be taken; and that this section shall not authorize the taking of residence property, or vacant lots adjacent thereto, in towns or cities, or other residence, gardens, orchards, graveyards, and cemeteries.

Any provisions in any special charters heretofore granted in respect to the exercise of the right of eminent domain which are in conflict herewith are hereby repealed."

The Blue Ridge Company, being organized for a double purpose ([1] to construct and operate an interurban railway, and [2] to sell and dispose of electricity), had the right, under either one of the statutes quoted above, to acquire by condemnation the right to divert the waters of Green River as proposed, provided the land and water rights to be condemned did not constitute a waterpower capable of being developed, and which was held to be developed and used in connection with some public service rendered by the owners.

Confining ourselves to the first statute above quoted, which applies to interurban railway companies, we find the following provisions of the statute:

(1) The statute applies to an interurban railway company owning land on one or both sides of a stream.

It is not denied that the Blue Ridge Company is an interurban railway company, and that it owns lands on both sides of the stream in question, except where the river is the dividing line, and there it owns the land on one side.

(2) The statute applies to an interurban railway company desiring to erect and maintain a waterpower plant for the purpose of generating electricity to be used in operating said railway, and in selling the surplus electricity.

It has been found by the Court below, and no exception taken to the finding, that the Blue Ridge

Interurban Railway Company proposes to develop the waterpower to be used in operating an interurban railway company. (Rec., p. 22.)

(3) The statute further provides that such company shall have the right to maintain and operate aqueducts, flumes, and all works necessary for the use and operation of a waterpower plant for generating electricity.

It was found by the Court below, in its seventh finding, to which there was no exception, that it was necessary for the Blue Ridge Company to acquire the rights sought to be condemned in the petition, namely, the right to divert the waters of the stream. (Rec., p. 22.)

(4) The statute further provides that where such company does not own the entire water front for all the lands, then it will have "the power to acquire any other lands, water rights, or easements which may be needed to fully develop such waterpower."

It is set forth in the petition that, in order to fully develop this waterpower, it was necessary to acquire the water rights owned by the defendants, and the Court so found, and there was no exception to the finding. (Rec., p. 22.)

(5) The second statute quoted above expressly granted to electric power companies "the right-of-way through all lands between their reservoirs, ponds, dams, works, and power-houses, with the right to divert the water from such ponds or reservoirs and conduct the same by flume . . . . to the point of use for the generation of the power at said power-house, returning said water to its proper channel after being so used."

The sole restriction or limitation upon this power, so far as it applies to interurban railways, is contained in the proviso which is quoted above, to the effect that such company "shall not have the power to condemn any waterpower, right, or property of any person, firm, or corporation engaged in the actual service of the general public, and where such power, right, or property is being used or held to be used or to be developed for use in connection with or in addition to any power actually used by such person, firm, or corporation serving the general public."

It will be seen, therefore, that so far as the statute law of this case is concerned, the sole question before the Court in determining whether the Blue Ridge Company could divert the river as proposed turned upon the decision of the Court as to whether the Hendersonville Company, which owned only to the middle of the stream, had a waterpower capable of being developed and used.

The undisputed evidence showed that Green River was a very narrow stream, and that where it ran between the lines of the petitioner and the defendant it was in some places as narrow as six feet in width. (See Rec., top p. 60.)

The Hendersonville Company claims that it could develop a waterpower by running a wing dam out to the center of this narrow stream and turning one-half of the water into a flume down to a power-house on its own land.

Under this contention, the sole question presented to the Court was whether the Hendersonville and Saluda Companies, having an ownership to the thread or center of this narrow stream, had a waterpower within the proviso of the statute above quoted.

We of course insist most strenuously and confidently that the settlement of this question, which involves the interpretation of a North Carolina statute, is for the Supreme Court of the State alone, and that there could be no Federal question involved which could give the Hendersonville and Saluda Companies any standing in this Honorable Court.

Proceedings in Superior Court

The Petition of the Blue Ridge Company will be found on page 14 of the Record, and the Blue Ridge Company, petitioner, therein set forth its organization as a corporation for the purpose of constructing an interurban railway company, and its plans for the erection of a dam and power-house, and the construction of a flume to convey the water from the dam to the power-house, and the petitioner asked that the Court condemn to this use the right to divert the water of Green River where it passed the lands owned by the defendants, the Hendersonville and Saluda Companies. This petition will be found beginning on page 14 of the Record.

The Answer of the defendants made certain admissions and certain denials, which it is not necessary to set forth here in detail. The sole reference in this Answer to any constitutional question will be found in the sixth paragraph (Rec., p. 21), where it is alleged:

"6. That upon advice, information, and belief, said respondents aver that the condemnation of the land described in the fifth paragraph of said petition, in the manner and for the purpose alleged in said petition, would be the taking of private property

without due process of law, and in violation of the Fourteenth Amendment to the Constitution of the United States."

Under the statute and practice obtaining in North Carolina in determining these condemnation proceedings, there are certain "questions of fact" which are to be passed upon by the Court, and certain "issues of fact" to be passed upon by the jury. Pursuant to this statute and practice, the Court passed upon and decided as herein set forth these questions of fact, which will be found on p. 22 of the Record.

> "1. Is it the intention of the Blue Ridge Interurban Railway Company, the petitioners, in good faith to conduct and carry on the public business authorized by its charter as set forth in paragraph One of the petition?
>
> "Answer. Yes.
>
> "2. Does the petitioner, the Interurban Railway Company, own lands on Green River, on one or both sides, and its tributaries, in Henderson and Polk Counties, which can be used for the development of a waterpower?
>
> "Answer. Yes.
>
> "3. Is it the purpose, and intention of the petitioner in good faith to build, construct, equip, and operate a street and interurban railway from the Town of Hendersonville, through Flat Rock and Saluda, to a point on Green River at or near the mouth of Big Hungry Creek in Henderson County, as alleged in paragraph Three of the petition?
>
> "Answer. Yes.
>
> "4. Is it necessary for the petitioner to generate electric power by developing same on Green River to operate said alleged railway?
>
> "Answer. Yes.

"5. Did petitioner, prior to the commencement of this proceeding, make a reasonable effort to agree with the respondent for the purchase of the right to divert the water from the lands of the respondents, as set forth in the petition?

"Answer. Yes.

"6. Was the petitioner's special proceeding for the condemnation of the property rights of the respondents as described in the petition for a public use?

"Answer. Yes.

"7. Is it necessary in order to fully develop petitioner's alleged waterpower on Green River, for the purposes alleged in its petition, to condemn the rights described in the petition?

"Answer. Yes.

"8. Is the respondent, the Hendersonville Light and Power Company, a corporation now engaged in the actual service of the general public?

"Answer. Yes."

To the determination by the Court of all the facts which are stated above, there was no objection or exception by either the Hendersonville Company or the Saluda Company.

The following ISSUES were submitted to the jury:

"A. Are there waterpowers, rights, and properties on the lands of respondents as described in the petition, capable of being developed for the production of electric power for use in connection with and in addition to the electric power already developed and in use by the respondent, Hendersonville Light and Power Company?

"Answer. No.

"B. Are there waterpowers, rights, or properties on the lands of the respondents, as described in the petition, which are being held by the respondent, Hendersonville Light and Power Company, to be used or to be developed for use in connection with or in addition to any power now actually used by the said respondent, Hendersonville Light and Power Company?

"Answer. No.

"C. What compensation are defendants, or either of them, entitled to recover for the acquirement by condemnation by the petitioners of the right to divert the water in the manner set forth in the petition?

"Answer. Ten thousand dollars ($10,000.00).

Neither the Hendersonville Company nor the Saluda Company asked for any other question of fact or issue of fact to be determined, either by the Court or by the jury, and hence it must be assumed beyond all controversy that the Hendersonville Company and the Saluda Company agree that the merits of the controversy are settled by a proper determination of the answers to the foregoing questions of fact and issues of fact.

An examination of the Record will show that the Hendersonville and Saluda Companies took upon themselves the burden of showing to the Court and jury that these companies did have (in the language of issue A, above set forth) waterpowers and rights "capable of being developed for the production of electric power for use in connection with and in addition to the electric power already developed and in use by the respondent, Hendersonville Light and Power Company."

As stated above, it was admitted that these companies owned only to the center or thread of this narrow stream, which was in some places only six feet wide, and the Hendersonville Company thereupon claimed that the jury should answer issue A in the affirmative, because the Hendersonville Company claimed that it did have a waterpower capable of being developed, in that it contended that it had the right, without any condemnation proceedings on its part, to take out what it termed its half of the water of Green River, and utilize this one-half of the water in constructing a waterpower.

An examination of the testimony will show that the only means whereby the Hendersonville Company claimed it was possible to develop a waterpower was by putting a wing dam on its side of this narrow stream, and thus taking out of the bed of the stream one-half of the water. In some places the stream is only six feet wide (see Rec., top p. 60.) In other words, it claimed ownership in one-half of the water, because the line of its tract of land ran to the center of the stream.

In the trial of the case below, the Hendersonville Company admitted that the burden was on it to procure an affirmative answer to issue A; or, in other words, the Hendersonville Company admitted that the duty devolved upon this Company to show to the Court and the jury that it could develop a waterpower out of one-half of this stream, without infringing on the rights of the opposite riparian owner.

The only plan which it proposed was, as stated above, the building of a wing dam into the stream, and the taking out of one-half of the water.

In the trial before the Superior Court Judge, the contest between the attorneys was upon the question as to whether, under the law pertaining to the rights of riparian owners in North Carolina, the Hendersonville Company could thus take out one-half of the water from the stream. The counsel for the Hendersonville Company claimed that it had such right, while the counsel for the Blue Ridge Interurban Railway Company claimed that there was no such right.

Inasmuch as the burden of proof was admittedly on the Hendersonville Company to produce evidence showing that this Company had water rights capable of being developed into a waterpower, and inasmuch as the only method which they presented to the Court and jury of developing the waterpower was taking out of the stream one-half of the water, this put it squarely up to the Judge who tried the case in the Superior Court as to whether the Hendersonville Company did have the right thus to take out one-half of the water; because, if it did not have that right, then ISSUE A must necessarily be answered in the negative. Upon these facts and contentions, the Superior Court Judge instructed the jury as follows:

> "A great many of the allegations in the Petition, substantially all of them, as you have heard the pleadings read, are denied by the respondents in their Answer, and this raises certain issues of fact which will be answered by the Court upon the evidence offered in the course of this trial, and having formulated and adopted by the Court to be answered, it is not necessary that they be read to you, because they are not submitted to you for your answer or consideration. There are certain issues which will be submitted to you,

and which I will indicate when I reach them in the orderly discussion of this matter from a standpoint of the law of the case.

"Passing therefore these questions of fact, I will read you the first issue which will be submitted to you by the Court for your answer, and the Court will instruct you later on that, if you believe all the evidence, you will answer this No.

"Issue A: Are there waterpowers, rights, or property on the lands of the respondents, as described in the Petition, capable of being developed for the production of electric power or used in connection with or in addition to the electric power already developed and in use by the respondent, Hendersonville Light and Power Company?

"Whether or not the land and property in question, owned by the respondents, or one of them, comes within the scope of property subject to condemnation is a matter of law depending upon a finding of fact by a jury as to the nature of the land sought to be condemned, and that is put in issue by the pleadings. We will take the law of this case to be in the consideration of this issue that the petitioner, Blue Ridge Company, is vested with power of condemnation of such lands or property as falls within the scope of the power given to it under its charter and by the General Assembly of North Carolina? There are certain lands and properties that this company could not condemn and can not take over or use. This company has not the power to condemn any waterpower, right, or property of any person, firm, or corporation engaged in the actual service of the general public, where such power, right, or property is being used, or held to be used or to be developed for use in connection with or in

addition to any power actually used by such person, firm, or corporation serving the general public.

"If the land in question and the water rights in connection with that land, of course, fall within the scope of the statement I have just recited to you as to the kind of lands and properties that this Blue Ridge Company could not condemn, then it would be exempt from condemnation in such a proceeding as we have. As to whether or not it does fall within the exemption clause of the statute which I have read would be a question of law, but it would be based upon a finding of fact by the jury as to whether this property is a waterpower or right or property of the Hendersonville Light and Power Company, or I will say of these two respondents, which is being used, or held to be used or to be developed for use in connection with or in addition to power now actually used by the Hendersonville Light and Power Company, one of the respondents here. The burden of showing it is such a property by the greater weight of the evidence rests upon the respondents, the Hendersonville Light and Power Company and the Saluda-Hendersonville Interurban Railway Company, and the Court is of the opinion, gentlemen of the jury, that taking the whole of the evidence, if you believe it all, it is not sufficient to sustain a finding upon the part of the jury that it is a property or property right which falls within this exemption clause of the statute, the Act of 1913, or otherwise in law, and so the Court now instructs you, if you believe all the evidence given in this case, that it is your duty to answer this ISSUE A No. The Court so instructs you that, if you believe all the evidence in this case, you will answer the first issue No. If this Court is wrong about this, the higher Court

will correct this Court; but you must take the law from this Court. The Court knows it is a question of fact to be submitted to the jury, but even then the law is if the presiding judge is of the opinion that there is not sufficient evidence to go to the jury to sustain that finding by them, where the burden rests upon a certain party to maintain it, he may direct the jury upon the whole of the evidence, assuming that you believe it all, to find the issue against the party upon whom rests the burden of proof; therefore I am instructing you that, if you believe all the evidence, every aspect of it in which it bears upon this issue, then it is your duty to answer the first issue No. I want to say in this case that I am led to this conclusion by what I conceive to be the law of the case, and that is, that it being admitted that the lines of these two properties at the place in question both run to the middle of the stream, that the Blue Ridge Company owns one-half of the bed of the stream on the south side, and these respondents or one of them owns one-half the bed of the stream on the north side, that each one of them have certain rights in the stream as the titles and rights stand today, so in my opinion in law the construction of a wing dam in the manner referred to by some of the witnesses here, supposing that it would develop a waterpower, would constitute an interference with the rights of the other party in such way that a wing dam, under the circumstances in this case, taking into consideration the location, size of the stream, and matters of that sort, could not be constructed so as to make it a waterpower or water property or electric power property, which would fall within the exemption clause of this statute which I have just read to you.

" 'A waterpower is land or easements in land owned by a party over which the water flows in sufficient volume that by damming it and constructing proper machinery, sufficient power can be produced that would be reasonably profitable of itself, or in use or connection with or in addition to other power owned by the party, by selling such power or using it in operation of machinery,' and the Court is of the opinion that the application of this definition of a waterpower in this case or cases of this nature and similar to this one, that it is necessary for us to take the property that we find the respondents have at the time of the proceedings and the trial, without regard to the property of anybody else that may lie on the other side of the stream—that is, we must consider the holdings of the respondents, and not what the situation would be in the event that the party owning one-half of the stream might at some future time be able to acquire the holdings of the owner of the property on the other side of the stream, and the consideration of these principles of law, and applying them to all of the evidence that the Court sees in this case, leads the Court to give you the instruction it has given in regard to this first issue.

"The second issue is in these words:

"B. Are there waterpowers, rights, or property on the lands of the respondents, as described in the Petition, which are being held by the respondent, Hendersonville Light and Power Company, to be used or to be developed for use in connection with or in addition to any power now actually used by said respondent, Hendersonville Light and Power Company?

"The same instruction which I have given in regard to the first issue, called ISSUE A, I give

you in regard to the second issue, which without needlessly going over them again, I instruct you as to this issue, if you believe all the evidence offered by both sides in this case, that it is your duty to answer this second issue, B, No."

Following the charge of the Judge, the jury rendered a verdict upon the issues submitted, assessing the value of the water rights which were condemned to the use of the Blue Ridge Company at the sum of Ten Thousand Dollars ($10,000.00.) Thereupon, judgment was rendered to the effect that, upon payment of the Ten Thousand Dollars ($10,000.00), the Blue Ridge Company should be entitled to divert the river at the place indicated, and use the waterpower developed by it for the public uses set forth in the Petition.

The Hendersonville and Saluda Companies appealed to the Supreme Court of North Carolina, and the case was transferred to that Court to be heard upon the exceptions, summary of which will be found in the Record, p. 82, as follows:

"Exception One. That the Court refused to allow the respondents' motion for judgment as of nonsuit, at the close of the petitioner's evidence.

"Exception Two. That the Court refused to allow the respondents' motion for judgment as of nonsuit, at the close of all the evidence.

"Exception Three. That the Court refused to give the following special instruction requested by respondents in writing, and in apt time, to wit:

"That if the stream, Green River, in its entirety, within the land described in the Petition, and the land adjoining said stream on the opposite side thereof, constitutes a waterpower,

then one-half of said stream, being an integral part of said waterpower, right, or property, would not be subject to condemnation, and you would therefore answer the second issue 'Yes.'

"Exception Four. That the Court refused to give the following special instruction requested by respondents in writing, and in apt time, to wit:

" 'That the entire stream, Green River, along the water front of respondents' land is a waterpower, and if the one-half of said stream owned by the respondents is condemned for the use of the petitioner, then the value of said one-half should be taken into consideration in estimating the amount of damages to which the respondents are entitled, as well as the other facts and circumstances tending to show the value of the proposed waterpower development of the petitioner, of which development the lands of the respondents forms an integral and necessary part according to the contentions of the petitioner.'

"Exception Five. That the Court refused to give the following special instructions requested by the respondents in writing, and in apt time, to wit:

" 'That if the jury should find from the evidence that the stream, Green River, in its entirety, between the land described in the petition and the land of the petitioner on the opposite side of the stream, contains a waterpower capable of development, and that such development, when made, has a market value, then it would be the duty of the jury in estimating the compensation to be awarded the respondents for the condemnation of their lands, to consider the value of such development to which such waterpower may be adaptable; and if the jury should find that the

respondents own one-half of the waterpower capable of development, then it would be the duty of the jury to award, as compensation to the respondents for the taking of their lands, or water rights, one-half of the value of such waterpower capable of such development.'

"Exception Six. That the Court charged the jury as follows, to wit:

" 'There will be only three issues submitted for your consideration, two of which the Court will instruct you later on, if you believe the evidence in this case, you will answer the first and second issues, or ISSUES A and B, "No"; and really, when you go out to consider your verdict, you will only have one issue to consider, that is, the issue as to the question of damages.'

"Exception Seven. That the Court further charged the jury as follows, to wit:

" ' . . . . and so the Court now instructs you, if you believe all the evidence given in this case, that it is your duty to answer this ISSUE A, "No." The Court so instructs you that, if you believe all the evidence in this case, you will answer the first issue, "No." '

"Exception Eight. That the Court further charged the jury as follows, to wit:

" 'The same instructions which I have given in regard to the first issue, called ISSUE A, I give you in regard to the second issue, which I will call ISSUE B, and upon the same principles of law; and without needlessly going over them again I instruct you as to this issue, if you believe all the evidence offered by both sides in this case, that it is your duty to answer this second issue, B, "No." '

"Exception Nine. That the Court rendered the judgment which appears in the Record."

We invite the careful attention of the Court to the foregoing exceptions, and particularly to the fact that not a single one of them is based upon any contention that any provision of the Constitution of the United States was being violated in the trial of the case, and in the disposition of it made by the Superior Court. Eliminating the exceptions which relate to the question of damages, it will be noted that the other exceptions relate to the fact that the Judge of the Superior Court, in his instructions to the jury, in effect told the jury that, under the law in North Carolina governing the rights of riparian owners, the Hendersonville Company, owning only one-half of the stream, could not take one-half of the water out of the stream and utilize it as a waterpower, and, therefore, the Hendersonville Company had no waterpower exempt from condemnation under the statute of North Carolina.

Under the oft-repeated decisions of the Supreme Court of North Carolina, no exceptions will be entertained by the Supreme Court except those that are specifically raised by exceptions, and, therefore, there being no exceptions in the Court below raising a constitutional question, such question could not be properly raised in the Supreme Court. The following, among other numerous cases, are referred to on this point:

Whissenhurst v. Jones, 80 N. C., 348;
King v. Ellington, 87 N. C., 573;
Draper v. Railroad Company, 161 N. C., 313.

We respectfully submit that the brief of attorneys for the Hendersonville and Saluda Companies in the Supreme Court of North Carolina raised no constitutional question whatever.

Decision of the Supreme Court of North Carolina

The case was argued, heard, and decided by the Supreme Court of North Carolina upon the exceptions presented. The first opinion of the Court was written by the Chief Justice, in which a majority of the Court concurred, to the effect that there was some evidence upon which the jury might have found that the Hendersonville Company did have a waterpower, and therefore Issue A should have been submitted to the jury under proper instructions.

Petition to rehear was filed, and upon the rehearing the majority of the Court, after reconsidering the evidence in the case, reached the conclusion that there was no evidence from which the jury could have answered Issue A otherwise than the jury was instructed to answer it in the charge of the Superior Court judge.

The opinion of the Court, rendered by His Honor, Judge Brown will be found on page 97 of the Record. The gist of this opinion will be found in the first paragraphs of the opinion, as follows:

> "This case is reported in 169 N. C., 471; 86 S. E., 296. It is a condemnation proceeding brought by the plaintiff to condemn certain property called a waterpower belonging to the defendant. The defendant owns the land on one side of the stream, and an individual half interest in the waterpower. The plaintiff owns the land on the other side of the stream, and a half interest in the waterpower. All waterpowers are as much subject to condemnation as any other property, unless it is established that they are 'being used or held to be used or to be developed for use in connection with or addition to any power actually

used by such persons, firms, or corporations serving the general public.' If this is not the correct principle to be applied to the facts in this Record, the statute conferring the right to condemn water rights is a dead letter, and such rights or power cannot be condemned by the terms of the statute. If we go further, and hold that, although not so used as specified in the statute, the owner may divert the water and convert it into such a waterpower, there is nothing left for the statute to operate upon. There are few, if any, streams in North Carolina the waters of which cannot be so diverted and developed into a waterpower.

"(2) The effect of this proviso in the statute (Laws 1907, c. 302, as amended, Chapter 94, Laws 1913; Gregory's Supp., Sec. 2575d) is to place the burden of proof upon the owner of the waterpower sought to be condemned, to introduce evidence sufficient to be submitted to a jury that will bring the property within the exception made by the above-quoted proviso. If the owner fails, then the property is subject to condemnation. If the owner offers sufficient competent evidence, it is the duty of the judge to submit the proper issue to the jury.

"(3, 4) It is earnestly contended upon the rehearing that the defendant has failed to offer any sufficient evidence tending to prove that its half interest in this waterpower can be developed in any practicable way consistent with well-established principles of law for use in connection with or addition to any power actually in use by defendant. That is the only proposition presented upon this rehearing. In his opinion, Mr. Justice Allen doubts if there is any evidence in the Record sufficient to go to the jury tending to bring the defendant's half interest in the waterpower

within the exception exempting it from condemnation. Further examination of the case compels the majority of the Court to the conclusion that there is no such evidence.

"We now conclude that all the evidence, taken in its most favorable light for defendant, discloses that the only feasible method by which the defendant can develop this waterpower for use is to construct a dam to the middle of the stream, and divert half the water through a flume on its own side of the river. This is the only practicable method pointed out by the evidence, and to develop it in that manner would violate a well settled principle of law."

And the point decided is also clearly stated by His Honor, Judge Allen, in a concurring opinion, from which we quote paragraph on page 101 of the Record:

"As pointed out in the opinion of Associate Justice Brown, where the evidence is quoted, the defendant did not claim that its waterpower could be so used or developed except by running a dam to the middle of the stream, and by diverting one-half the stream, and conducting it one-half mile through its own land before its return to the stream; and in the opinion of the Court this is not permissible, the Court having adopted as the correct rule determining the right in non-navigable water of opposite riparian owners the one laid down by Angell on Water Courses, Sec. 100, as follows: 'Whenever a water course divides two estates, the riparian owner of neither can lawfully carry off any part without the consent of the other opposite; and each riparian owner is entitled, not to half, or other portion, of the water, but to the whole bulk of the stream, undivided and undivisible, or per et per tout. To use the language of Platt, J., in *Vandenburgh v.*

Van Bergen (13 Johns., N. Y., 217), in New York: . . . . 'The grant of an undivided share in a stream . . . . would not authorize the grantee to appropriate or modify the stream to the injury of others, who have a joint interest in it. The property in a stream of water is indivisible. The joint proprietors must use it as an entire stream, in its natural channel. A severance would destroy the rights of all.' "

Two of the judges of the Supreme Court dissented. Mr. Justice Hoke dissented in a brief opinion (top page 110), on the ground that the decision of the question as to whether the Hendersonville Company had a waterpower in its ownership to the middle of the stream was a mixed question of law and fact, and should have been left to the jury.

His Honor, Chief Justice Clark, dissented in quite an elaborate opinion. The Chief Justice takes issue sharply with a majority of the Court upon the question of riparian rights in North Carolina. He contends that if two opposite riparian owners each own to the thread or center of the stream, this gives to either one of them the right to utilize one-half the water of the stream. The Chief Justice furnishes the basis of this writ of error to the Supreme Court of the United States in that part of his opinion in which he says:

"The defendants further contend that they are entitled to be protected in their rights under the provisions of the Federal Constitution—that they shall not be deprived of their property 'without due process of law, nor denied the equal protection of the law'—on four grounds:

"(1) It is not the 'law of the land' that property off the line of the railway, not needed for its

construction, can be taken by a railroad company merely to aid in its operation, such as a coal mine, or wood for fuel or for crossties, or waterpower. Such property for such purposes cannot be taken under 'due process of law.'

"(2) Neither can public property like that of the defendant, already devoted to the same public purpose, be taken under the right of eminent domain. (Lewis' Em. Dom., Sec. 400.) As well might one railroad company condemn the track, or the engines, or the cars of another. While one road can condemn a right-of-way across the track of another, it does not take the sole and exclusive use of the track at that point, as the plaintiff seeks in regard to the property of the defendant.

"(3) Both the State and Federal Constitutions guarantee the right of trial by jury as to disputed issues of fact. Putting the case most strongly for the plaintiff, whether or not the defendants can utilize their half interest in this waterpower is upon the evidence of a much-disputed issue of fact, and the Court could not deprive them of this right under 'the law of the land.'

"(4) The public policy of the Federal and State government, as shown by statutes and by decisions, notably in the judgments dissolving the American Tobacco Company, the Standard Oil Company, the Sugar Trust, the Hartford and New Haven Railroad combination, and many other cases, is that such combinations are injurious to the public welfare, and 'contrary to the law of the land.' "

These several grounds will be noted more fully later on in the brief, when we come to discuss the assignments of error which the plaintiffs in error have set

forth as a basis for their contention that the judgment of the Supreme Court of North Carolina should be reversed. We wish to call the attention of the Court to the fact, however, that the difference between the majority of the Court and the Chief Justice was, after all, nothing but a difference of opinion as to the rights of riparian owners in the State of North Carolina, and surely no one can contend that this is a question involving the Constitution of the United States.

No Federal Question Involved

It is again earnestly submitted that there is no Federal question involved in the case, or if the Federal question has been technically raised by proper pleading, it will nevertheless appear to the Court at a glance that there has been no violation of any Federal rights, and particularly no violation of the rights conferred by the Fourteenth Amendment, which is the clause of the United States Constitution alone relied upon by the plaintiffs in error.

The fact that the Chief Justice certifies that Federal questions are involved will not control, when the opinion of the Court shows that no such question was involved.

Biddle v. Bellingham Company, 163 U. S., 63 (41 : 72).

Upon examination of the assignments of error, which will be found in the Record, beginning on page 3, it will be seen that these assignments group themselves into three main contentions:

1. It is contended that the Federal Constitution is violated in that the Court held that the petitioner, the Blue Ridge Interurban Railway Company, could

acquire by the exercise of the power of eminent domain the right to divert the waters of the river, so as to take them away from the lands of the defendants in error.

2. It is further contended that the Court deprived the plaintiffs in error of their constitutional rights in not permitting a jury to say whether these companies had the right to use one-half the water of the stream in constructing a waterpower.

3. It is further contended that the Court deprived the plaintiffs in error of their Constitutional rights, in that the Court held that the uses which the petitioner, the Blue Ridge Interurban Railway Company, intended to make of the proposed waterpower development was a private use, and was one for which the rights of the plaintiffs in error could not be condemned.

We shall show that none of these questions involves a Federal question, but are all determined by the State statutes and decisions.

Federal Constitution Not Involved in Determining Riparian Rights

Coming to the first one of these questions, it will be found that the North Carolina statutes, quoted in the earlier part of this brief (p. 5) expressly confer upon corporations such as the Blue Ridge Company the power to acquire by eminent domain the right to divert the water of a stream in order to fully develop. the waterpower. The Supreme Court of North Carolina has held that this is a valid exercise of the power of eminent domain, and has held that where the boundary line of one riparian owner extends to the thread or middle of the stream, such owner cannot

take one-half of the water out of the stream and utilize it in constructing a waterpower. These statutes and this decision of the Supreme Court of North Carolina is with reference to a matter purely within the power of the Legislature of the State, and in no way infringes upon any rights guaranteed by the Fourteenth Amendment. This has been held by repeated decision of this Court.

In *Rundle v. Delaware and Raritan Canal Company*, 14 How., 79 (14 : 335), the Court said:

> "It is evident that the extent of the plaintiff's rights as a riparian owner, and the question whether this proviso operates as the grant of a usufruct of the waters of the river, or only as a license or toleration of a nuisance, liable to revocation, or subordinate to the paramount public right, must depend on the laws and customs of Pennsylvania, as expounded by her own Courts. It will be proper, therefore, to give a brief sketch of the public history of the river and the legislative action connected with it, as also of the principles of law affecting aquatic rights, as developed and established by the Courts of that State."

In *City of St. Louis v. Rutz*, 138 U. S., 226 (34 : 911), it is said:

> "The question as to whether the fee of the plaintiff, as a riparian proprietor on the Mississippi River, extends to the middle thread of the stream, or only to the water's edge, is a question in regard to a rule of property, which is governed by the local law of Illinois."

In *St. Anthony Falls Waterpower Company v. Board of Water Commissioners*, 168 U. S., 349 (49 : 497), it is said:

"It is claimed upon the part of the plaintiffs in error that by the decision of the Court below they have been deprived of their property without due process of law. They urge that they have certain rights as riparian owners of land near St. Anthony Falls, bordering upon the Mississippi River, to the use of all the water as it would naturally flow past their land, and that this right is property; that its existence and extent are to be determined by the general law applicable to riparian owners in like situation, which right is not determined conclusively by a State Court, and that being property it cannot be taken away or impaired either by other private owners or by the State, except that if the latter should require the use of any portion of the water for any public purpose it may only be taken or diverted upon due compensation being made. These rights, it is claimed, are protected by the Federal Constitution, and that as such claim was duly presented before the State tribunal, the question is now open for review by the Court. . . . . In regard to the first proposition, we are of opinion that the property rights of the plaintiffs in error, as riparian owners, are to be measured by the rules and decisions of the State Courts of Minnesota. This principle, we think, has been announced and adhered to by this Court from its very early days, and no distinction has been made between the rights of the original States and those which were subsequently admitted to the Union under the provision of the Federal Constitution."

No Federal Right of Trial by Jury Denied

In the dissenting opinion, the Chief Justice states that the Federal Constitution was violated in this case because the Judge gave a peremptory instruction to the effect that the plaintiffs in error could not use the

one-half of the stream in constructing a waterpower, whereas this was a question of fact for the jury. The plaintiffs in error have assigned this ruling of the Court as a violation of the Federal Constitution. This ground for reversal is embodied in the third and fourth assignments of error, found on page 4 of the Record.

It is respectfully submitted, however, that there is no provision of the Federal Constitution which guarantees any trial by jury in the State Courts in civil matters, and particularly there is no provision in the Federal Constitution which directs the manner in which a judge shall charge a jury—that is, whether certain questions shall be treated as questions of law for the judge or questions of fact for the jury.

In this particular case it is claimed that the Federal Constitution is violated because the judge in the Superior Court told the jury as a matter of law that the Hendersonville and Saluda Companies had no waterpower capable of being developed, because under the law of North Carolina they had no right to take out the waters of one-half the stream, therefore the jury were instructed to answer the ISSUE A in the negative; and it is now claimed that this was a violation of the Federal Constitution, because the Superior Court judge should have left it to the jury themselves to say whether the law of North Carolina permitted one riparian owner to take out one-half of the water.

It is certainly a novel contention that a jury should have been allowed to decide this question instead of having the Court decide it.

But, however this may be, all questions involving the right of trial by jury in civil matters, and par-

ticularly the method of conducting these trials, are left to the State statutes and the decisions of the State Courts, and involve no Federal question.

This was clearly set forth in *Walker v. Sauvinet*, 92 U. S., 90 (23 : 678), as follows:

> "All questions arising under the Constitution of the State alone are finally settled by the judgment below. We can consider only such as grow out of the Constitution of the United States. By Article VII of the Amendments it is provided that, 'In suits of common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' This, as has been many times decided, relates only to trials in the Courts of the United States. *Edwards v. Elliott*, 21 Wall., 557 (88 U. S., XXII, 492). The States, so far as this Amendment is concerned, are left to regulate trials in their own Courts in their own way. A trial by jury in suits at common law pending in the State Courts is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law, but this does not necessarily imply that all trials in the State Courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. *Murray v. Hoboken L. and I. Company*, 18 How., 280 (59 U. S., XV, 376). Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land; that is to say, with the Constitution and laws of the United States made

in pursuance thereof, or with any treaty made under the authority of the United States. (Art. VI, Const.) Here the State Court has decided that the proceeding below was in accordance with the law of the State; and we do not find that to be contrary to the Constitution, or any law or treaty of the United States."

And in a later case, *Iowa Central Railway Company v. State of Iowa*, 160 U. S., 389 (40 : 467), the Court said:

> "It was not a denial of a right protected by the Constitution of the United States to refuse a jury trial, even though it were clearly erroneous to construe the laws of the State as justifying the refusal."

No Taking of Property for Private Use

The third general ground upon which the plaintiffs in error seek to reverse the judgment of the State Supreme Court is that it is contended that the uses which the petitioner, the Blue Ridge Interurban Railway Company, proposes to make of the waterpower was a private use.

Turning to the findings of fact made by the Superior Court judge on the trial of the case, we refer particularly to the questions numbered 1, 3, 4, and 7, as follows:

> "1. Is it the intention of the Blue Ridge Interurban Railway Company, the petitioners, in good faith to conduct and carry on the public business authorized by its charter as set forth in paragraph one of its Petition?
>
> "Answer. Yes.

"3. Is it the purpose and intention of the petitioner in good faith to build, construct, equip, and operate a street and interurban railway from the Town of Hendersonville, through Flat Rock and Saluda, to a point on Green River at or near the mouth of Big Hungry Creek in Henderson County, as alleged in paragraph three of the Petition?

"Answer. Yes.

"4. Is it necessary for the petitioner to generate electric power by developing same on Green River to operate said alleged railway?

"Answer. Yes.

"6. Was the petitioner's special proceedings for the condemnation of the property rights of the respondents, as described in the Petition, for a public use?

"Answer. Yes.

"7. Is it necessary in order to fully develop petitioner's alleged waterpower on Green River for the purposes alleged in its Petition to condemn the rights described in the petition?

"Answer. Yes."

There was no exception or objection to any of these questions, and no request by the parties that any additional facts be found.

We call special attention to the finding in answer to the sixth question above set forth, which conclusively shows that the condemnation proceedings were "FOR A PUBLIC USE." There was no exception or objection to this finding, and certainly this fixes it finally and conclusively in this case that the uses to be made of the property by the Blue Ridge Company were PUBLIC USES.

Here, then, it was distinctly found, without objection or exception, that the Blue Ridge Company proposed to carry on a business of a public nature, and by turning to the original petition (Rec., p. 14), it will be found that this public business which the petitioner proposed to carry on was the construction and operation of an Interurban Railway, and also the selling of electricity. It is difficult to see how it could be more clearly or conclusively shown that the purposes for which the power of eminent domain was invoked were public purposes and not private.

However this may be, the enactment by the Legislature of North Carolina of the statutes hereinbefore set forth was unquestionably a legitimate exercise of legislative authority within the scope of its power to provide for the welfare and prosperity of the people of the State.

Head v. Amoskeag Manufacturing Company, 113 U. S., 9;

Fallbrook Irrig. Dist. v. Bradley, 164 U. S., 112;

Wurts v. Hoagland, 114 U. S., 606;

Manigault v. Springs, 199 U. S., 473.

In *Head v. Amoskeag Company,* 113 U. S., 9 (28 : 889), this Court considered the New Hampshire statute which allowed the owners of a private manufacturing enterprise to erect a dam and back water upon the proprietors above upon payment of damages. The statute was attacked upon the ground that it allowed the appropriation of private property by private corporations for private purposes against the will of the owners. This Court held otherwise, and said:

We call the especial attention of the Court to the recent case of **Wadsworth Land Company v. Piedmont Traction Company**, 162 **N. C.**, 314, in which the Supreme Court of North Carolina held that, although a public service corporation might have power to conduct business of a private nature, this did not deprive it of the right of condemnation for the public uses contemplated by its charter.

"We prefer to rest the decision of this case upon the ground that such a statute, considered as regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed, with a due regard to the interests of all, and to the public good, is within the constitutional power of the Legislature. When property, in which several persons have a common interest, cannot be fully and beneficially enjoyed in its existing condition, the law often provides a way in which they may compel one another to submit to measures necessary to secure its beneficial enjoyment, making equitable compensation to any whose control of or interest in the property is thereby modified. . . . .

"The right to the use of running water is *publici juris,* and common to all the proprietors of the bed and banks of the stream from its source to its outlet. Each has a right to the reasonable use of the water as it flows past his land, not interfering with a like reasonable use by those above or below him. One reasonable use of the water is the use of the power, inherent in the fall of the stream and the force of the current, to drive mills. That power cannot be used without damming up the water and thereby causing it to flow back. If the water thus dammed up by one riparian proprietor spread over the lands of others, they could at common law bring successive actions against him for the injury so done them, or even have the dam abated. Before the Mill Acts, therefore, it was often impossible for riparian proprietor to use the waterpower at all, without the consent of those above him. The purpose of these statutes is to enable any riparian proprietor to erect a mill and use the waterpower of the stream, provided he does not interfere with an earlier exercise by another of a

like right, or with any right of the public; and to substitute, for the common law remedies of repeated actions for damages and prostration of the dam, a new form of remedy, by which anyone whose land is flowed can have assessed, once for all, either in a gross sum or by way of annual damages, adequate compensation for the injury.

. . . . It is not a right to take and use the land of the proprietor above, against his will, but it is an authority to use his own land and water privileges to his own advantage and for the benefit of the community. It is a provision by law, for regulating the rights of proprietors on one and the same stream from its rise to its outlet, in a manner best calculated, on the whole, to promote and secure their common rights in it. . . . .

"Being a constitutional exercise of legislative power, and providing a suitable remedy, by trial in the regular course of justice, to recover compensation for the injury to the land of the plaintiff in error, it has not deprived him of his property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States."

In the later case of *Otis Company v. Ludlow Manufacturing Company*, 201 U. S., 140 (50 : 696), this Court held that statutes of Massachusetts of a similar character to the one which was attacked in the New Hampshire case, were constitutional.

In 5 Encyc. of United States Supreme Court Reports, p. 763, it is said: "It is within the power of the Legislature to determine within certain limits what are public purposes, or uses for which property may be appropriated."

To sustain this proposition, numerous decisions of this Honorable Court will be found in Note 63:

> "When the use is public—and within certain limits, the State may determine that it is so—any property which the State may deem necessary or expediency of the appropriation is not a matter for judicial inquiry. *Spring Valley Waterworks v. Schottler,* 110 U. S., 347, 378; 28 L. Ed., 173.
>
> "It is stated in the second volume of Judge Dillon's Work on Municipal Corporations (4th Ed., Sec. 600) that, when the Legislature has declared the use or purpose to be a public one, its judgment will be respected by the Courts, unless the use be palpably without reasonable foundation. Many authorities are cited in the note, and, indeed, the rule commends itself as a rational one. *United States v. Gettysburg Electric Railway Company,* 160 U. S., 668, 680; 40 L. Ed., 576."

Assignments of Error Briefly Considered Seriatim

While it is submitted that the argument already made completely disposes of each one of the points raised by the assignment of errors, we will, nevertheless, briefly consider these separately.

First Assignment of Error. The first assignment of error, to the effect that the Court violated the Fourteenth Amendment in holding that property off the line of a railroad could not be taken to aid in its operation, finds no support either in the facts of this case or in any Constitutional provision or decision of any Court. The case here presented to the Court is that of a waterpower development to generate electricity for the operation of an interurban railway

company, and for the sale of the surplus electricity. The matter is one entirely for the State Legislature, and the Acts of the Legislature, interpreted by the Supreme Court of the State, are controlling, as set forth above.

SECOND ASSIGNMENT OF ERROR. The second assignment of error, to the effect that the Fourteenth Amendment was violated in that the Court held that public property already devoted to public purposes could not be taken by the right of eminent domain, finds no support either in the facts of this case or in any provision of the Constitution.

There was no finding of fact that the water rights owned by the plaintiffs in error were devoted to public purposes, but, on the contrary, there was an express finding by the Court and jury that the plaintiffs in error did not have any water rights or property that could be devoted to public purposes.

Besides that, these are all questions to be controlled by the Legislative policy of the State, and involve no Federal question.

THIRD AND FOURTH ASSIGNMENTS OF ERROR. The third and fourth assignments of error are to the effect that the Fourteenth Amendment was violated in that the Court did not permit the jury to say whether the plaintiffs in error had a waterpower, or could utilize one-half of the stream in developing a waterpower.

We have already shown in the citations above that there is no provision of the Federal Constitution guaranteeing a jury trial in the State Courts, and that the States are permitted to dispose of cases either by jury trial or otherwise, in such manner as the State Legislature may determine. As a matter of fact, the

Court did submit this question to the jury, but merely told the jury that, on the admitted facts of the case, the plaintiffs in error could not, under the laws of North Carolina, take one-half the water out of the stream, and therefore that they had no waterpower, and that ISSUE A must be answered No. The plaintiffs in error bring this case before this Court on the proposition that the Supreme Court of the United States should control the method of disposing of cases before juries in ordinary civil actions in State Courts, and should tell the State Courts what matters are matters of law and what are questions of fact to be determined by the jury. Surely a proposition of this character needs no discussion.

FIFTH, SIXTH, AND SEVENTH ASSIGNMENTS OF ERROR. The fifth, sixth, and seventh assignments of error present the proposition that the Fourteenth Amendment is violated because the Supreme Court of North Carolina held that the property of the plaintiffs in error could be taken to aid in the proposed waterpower development, whereas the purpose of the defendant in error is to use the electricity generated for private purposes.

These are most singular propositions, in the light of the findings of fact by the judge, found in the Record on page 22. It was there found that it was the intention of the Blue Ridge Interurban Railway Company, the petitioner in that case, to use these water rights for public purposes. There was no exception to these findings, and there not only was no finding to the effect that no part of the electricity generated was to be used for private purposes, but there was no evidence to sustain such a finding, and no request in the Court below that there should be any such finding.

Besides all this, we have shown in the citations of authority, in the former part of this brief, that the uses to which the streams in any State may be put are matters of State legislation. In this connection, we call attention to the judgment of the Court, which will be found on page 81 of the Record, in which the Court permits the Blue Ridge Interurban Railway Company to divert the stream in the manner proposed, *"and appropriate the same to the public uses in the manner as set forth in the Petition."*

EIGHTH ASSIGNMENT OF ERROR. The eighth assignment of error, to the effect that the Fourteenth Amendment was violated because it appeared that the defendant in error owned other power property which it could develop and use, has no support in the facts of the case, nor in any provision of the Constitution.

The findings of fact, shown on page 22 of the Record, show that this particular property was necessary in the development of the waterpower. There was no finding, nor any request for any finding, that the defendant in error owned other property, and there was no evidence to support such a finding if it had been requested. The statute permitting this development plainly allowed the full development of the waterpower. (See language of statute quoted in the former part of the brief.)

Besides, all these are questions for the State Legislature, as shown in the former part of the brief.

NINTH ASSIGNMENT OF ERROR. The ninth assignment of error merely makes the general contention that the judgment of the Court violated the Fourteenth Amendment of the Constitution.

It may be assumed that the various phases of this contention are presented in the other assignments of error, which are more specific. At any rate, we do

not deem it necessary to attempt to discuss such a general assignment.

TENTH ASSIGNMENT OF ERROR. The tenth assignment of error, to the effect that the Supreme Court of North Carolina held that the plaintiffs in error were not entitled to investigate the contention that there was a combination injurious to public welfare, finds no support in the facts of the case.

We again call attention to the findings of fact on page 22 of the Record, and that there was not a single request that there should be any other finding. There was no exception taken in the Court below upon this ground, and no allusion made anywhere in the Record to the matter, except in the dissenting opinion of the Chief Justice. The counsel for plaintiffs in error will not be able to show the Court a line of testimony supporting the statement that the defendant in error was engaged in any combination. We refer the Court to the concurring opinion of His Honor, Judge Allen, found on page 100 of the Record, in which His Honor states: "I have carefully examined the Record in this appeal several times, and I do not find a line in it which would warrant the charge that the plaintiff is a trust, or that it is owned by the Southern Power Company, or by the Dukes."

Besides that, if the defendant in error was a trust, how could the trust be attacked in a proceeding brought in the State Court for the exercise of the power of eminent domain? What is there in the Fourteenth Amendment that supports such a contention?

ELEVENTH ASSIGNMENT OF ERROR. The eleventh assignment of error raises the same point already discussed, to the effect that the Fourteenth Amend-

ment was violated in that the Court permitted the property of the plaintiffs in error to be condemned for use, not a public use.

We have already shown that the findings of fact by the judge and the judgment of the Court distinctly set forth that the uses were public uses. This point has already been covered in the previous part of the brief.

TWELFTH ASSIGNMENT OF ERROR. The twelfth assignment of error sets forth that the Fourteenth Amendment is violated in that the Court held that the defendant in error had the right to condemn the property of the plaintiffs in error for the public purposes set forth in the petition.

This question has already been fully discussed in the authorities above, in which it is shown that matters of this kind are solely within the power of the State Legislature, and that the decisions of the Supreme Court of the State are conclusive.

WHEREFORE, and for all these reasons, the defendant in error respectfully asks this Honorable Court to dismiss the Writ of Error, or to affirm the judgment of the Supreme Court of the State of North Carolina, for that there is no question involved in the Writ of Error which is worthy of serious consideration by this Court.

Respectfully submitted

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No. 497

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No._____

HENDERSONVILLE LIGHT AND POWER COMPANY AND SALUDA-HENDERSONVILLE INTERURBAN RAILWAY COMPANY, Plaintiffs in Error, v. BLUE RIDGE INTERURBAN RAILWAY COMPANY, Defendant in Error.	Writ of Error to the Supreme Court of the State of North Carolina

SUPPLEMENTAL BRIEF OF COUNSEL FOR DEFENDANT IN ERROR, IN REPLY TO BRIEF FILED BY COUNSEL FOR PLAINTIFFS IN ERROR.

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IN THE

SUPREME COURT OF THE UNITED STATES

No.....

October Term, A. D. 1916

Hendersonville Light and Power Company and Saluda-Hendersonville Interurban Railway Company, Plaintiffs in Error

v.

Blue Ridge Interurban Railway Company, Defendant in Error

Writ of Error to the Supreme Court of the State of North Carolina

SUPPLEMENTAL BRIEF OF COUNSEL FOR DEFENDANT IN ERROR, IN REPLY TO BRIEF FILED BY COUNSEL FOR PLAINTIFFS IN ERROR.

When counsel for the defendant in error filed the original brief in support of its motion to dismiss or affirm the writ of error in this case, we were supposing that the counsel for the plaintiffs in error were relying upon all of the assignments of error set forth in the petition for writ of error. We found, however, that

when the brief for the plaintiffs in error was filed they **abandoned** all of the grounds set forth in the petition, with one exception only.

It was also presumed that the dissenting opinion of Chief Justice Clark had formed the basis of the action of the plaintiffs in error in bringing this case to this Honorable Court; but here, again, when we examine the dissenting opinion of the Chief Justice, and examine in connection therewith the brief filed by the plaintiffs in error, it is somewhat astonishing to find that **the plaintiffs in error have abandoned every position taken by the Chief Justice in his dissenting opinion.**

The sole ground now advanced by counsel for the plaintiffs in error as a basis for their contention that the Fourteenth Amendment has been violated is that the charter of the defendant in error gives it the power to engage in private business along with its public business, and that this condemnation proceeding is for private uses. The charter powers of the Blue Ridge Interurban Railway Company are set forth in its petition (Rec., p. 1). For the purpose of this discussion, it may be noted that the charter of the Company gives it power and authority as follows:

1. To construct and operate an interurban railway company by means of electricity generated by water-power.

2. To sell to the public all electricity generated over and above what is necessary to operate the interurban railway.

3. To own and operate manufacturing plants.

It will, therefore, be seen that the corporation is organized to discharge two functions which are distinctly of a public nature, viz.:

1. Operating an interurban railway Company; and
2. Selling electricity for manufacturing purposes.

The third power granted the corporation, to operate manufacturing plants, does not give the corporation any authority or power to use the electricity generated by its power plant for the purpose of operating the manufacturing plants which are operated by the corporation itself.

CONDEMNATION FOR PUBLIC USES

While the corporation was authorized by its charter to engage in the manufacturing business, it nevertheless appears conclusively that this condemnation proceeding was instituted, not to enable it to engage in private business, but solely for the public purposes set forth in its charter.

On page 22 of the Record will be found the findings of the Court, and we here copy the questions and answers numbered 1, 3, and 6, viz.:

1. Is it the intention of the Blue Ridge Interurban Railway Company, the petitioners, in good faith to conduct and carry on the **public business** authorized by its charter as set forth in Paragraph One of its petition?

Answer. Yes.

3. Is it the purpose and intention of the petitioner in good faith to build, construct, equip, and operate a street and interurban railway from the Town of Hendersonville, thru Flat Rock and Saluda, to a point on Green River at or near the mouth of Big Hungry Creek in Henderson County, as alleged in Paragraph Three of the petition?

Answer. Yes.

6. Was, the petitioner's special proceeding for the condemnation of the property rights of the respondents as described in the petition for **a public use?**

Answer. Yes.

There was not a single objection nor an exception raised by the plaintiffs in error (defendants below) to any of these findings by the Court, nor was there any request that there should be any additional findings.

How then, in the face of the express finding of the Court that this condemnation proceeding was for public purposes, can the plaintiffs in error now gravely argue before this Court that the condemnation proceeding was for private purposes?

DECISION OF NORTH CAROLINA SUPREME COURT CONCLUSIVE

We have already called attention to the fact that the plaintiffs in error have abandoned every single ground which Chief Justice Clark set forth in his dissenting opinion as a basis for the contention that the Fourteenth Amendment had been violated. We now show the Court that the only ground which the plaintiffs in error now present to the Court, namely, that the corporation has the power to do private business, and therefore can not exercise the right of eminent domain, even for its public purposes—has been fully and squarely met by an opinion of the Supreme Court of North Carolina, rendered by the very same Chief Justice who filed the dissenting opinion in this case. We refer to the case of Wadsworth Land Company v. the Piedmont Traction Company, 162 N. C., 314; and as this opinion so completely disposes of every contention made by the plaintiffs in error in their brief, we give it here in full:

> "The plaintiff contends that the Piedmont Traction Company can not exercise the power of eminent domain, because under its charter it is authorized to engage in private business in addition to its authority to operate a street railway, which is a quasi-public business. We think the

law is clearly stated thus in 15 Cyc., 579: 'But the fact that the charter powers of the corporation, to which the power of eminent domain has been delegated, embrace both private purposes and public uses, does not deprive it of the right of eminent domain in the promotion of the public uses.' The traction company has the power of eminent domain, not only by virtue of its charter, but by Revisal, Secs. 1138 and 2575. Street Railroad Company v. Railroad, 142 N. C., 423.

"In **McIntosh v. Superior Court,** 56 Wash., 214, it is said: 'It is next contended that while the company is authorized to construct and build railroads, it is also authorized to engage in private business. Conceding this to be true, the company may condemn and appropriate the land for the aid of its public purposes, for public uses only.' To same purport, Power Company v. Webb, 123 Tenn., 596.

"The plaintiff further objects that the defendant's charter shows that a great many of its purposes are private, and that the petition does not show that the lands sought to be taken will not be used for such private purposes. Looking into the petition, it is there stated that the defendant desires this land in connection with its work for the production of power 'to generate electricity for the use and benefit of the public.' It has the power of condemnation under its charter and the general statute, and nothing in this record discloses that the petitioner is seeking the land for any other than public purposes. We can not presume it to be acting in bad faith. If, after acquiring the land under condemnation for a public

use, the petitioner should devote it to private purposes, there is a remedy by **quo warranto** and otherwise. The mere possession of incidental powers under the charter to engage in private enterprises will not be held to deprive the corporation of the right of eminent domain to effectuate its public purposes, and when it is seeking to exercise this right for the public uses which it is authorized to undertake. **Walker v. Power Company,** 19 L. R. A. (N. S.), 725; **Brown v. Gerald** (Me.), 109 Am. St., 526; **Collier v. Railroad,** 113 Tenn., 121; Lewis on Em. Dom. (3 Ed.), 314.

"In **Street Railroad v. Railroad, supra,** it was contended that the plaintiff was not pursuing the public purpose expressed in its charter of building a street railroad in Fayetteville, but was building a branch line in the country, and was therefore acting **ultra vires.** The Court said that such objections, 'even if valid, can only be made available by direct proceedings instituted by some member of the company for unwarranted or irregular procedure on the part of the officers, or by the State for abuse or nonuse of its franchise, and are not open to collateral investigation in a case of this character, nor at the instance of the defendant.'

"The traction company has taken out its charter under the general corporation law, as authorized by Revisal, 1138, and that section provides that the term 'street railway' included railways operated by steam or electricity or any other motive power, used and operated between different points in municipalities lying adjacent to each other, and that such railways may carry and deliver freight, etc., with the restriction that the line

so operated shall not extend in any direction more than fifty miles from the municipality in which the home office is situated.

"We do not see anything in the petition of an intention on the part of the traction company to use the property sought to be condemned for any other than quasi-public purposes. It is true, as the plaintiff contends, that the petition uses the words 'commercial railway.' But that is purely a matter of phraseology, for the company is engaged in commerce when it carries articles of merchandise.

"The plaintiff contends that the traction company proposes to engage in interstate business. The traction company, however, is now operating only between Charlotte and Gastonia. It would not be in violation of the terms of its charter if it should take freight or passengers to be delivered at either terminus to other carriers to be transported beyond the limits of the State. The traction company would not thereby be exceeding its chartered rights, and, if it did, the remedy is, as already stated, not to be found by refusing the company the right to condemn an easement thru the land, which certainly is within the scope of its chartered powers, for the transaction of legitimate business. The Court will not sustain a collateral attack, and deny the right of condemnation upon a suggestion that the petitioner may exceed its chartered right in the use of the property thus acquired by condemnation."

It is respectfully and confidently maintained that the foregoing opinion of the Chief Justice of North Carolina settles conclusively every question now before this honorable Court. We call special attention to that portion of the opinion in which the Court says:

"If, after acquiring the land under condemnation for a public use, the petitioner should devote it to private purposes, there is a remedy by **quo warranto** and otherwise."

In the conclusion of the opinion it is said:

"The Court will not sustain a collateral attack, and deny the right of condemnation upon a suggestion that the petitioner may exceed its chartered rights in the use of the property thus acquired by condemnation."

From the above it will appear that under the method of procedure obtaining in the Courts of North Carolina, the remedy provided by the laws of this State for a violation by a corporation of its charter powers in using for private purposes property rights which have been acquired by condemnation for public purposes is not to deny the corporation the right to condemn; but the illegal use of the property rights thus acquired may be prevented by proceedings in the nature of "quo warranto or otherwise." In the case at bar, if, after constructing the power plant which the Blue Ridge Interurban Railway Company proposes to construct, it should thereafter use the electricity generated for such private purposes as might be determined by the Court to be illegal, then the remedy would be against the corporation by "quo warranto, or otherwise." Inasmuch, then, as an adequate remedy is provided by the laws of North Carolina, it can not be said that the provisions of the Fourteenth Amendment were violated from any standpoint, because the laws of North Carolina do provide ample means to prevent such illegal use of corporate powers by corporations exercising the right of eminent domain.

OTHER AUTHORITIES CITED

If it is necessary to cite any other authorities sustaining the Supreme Court of North Carolina, we would search in vain for any decisions which more conclusively sustain our view than the decision cited in the brief of the plaintiffs in error.

We call especial attention to the case of **Walker v. Shasta Power Company,** 160 F., 856, relied upon by counsel for plaintiffs in error, and cited with approval by the Supreme Court of North Carolina in the case quoted above. The Circuit Court of Appeals for the Ninth Circuit in that case, considering the very question before the Court in case at bar, says:

> "But both private purposes and public uses are contemplated in the articles of incorporation of the defendant in error, as those articles stood at the time of the commencement of the suit. On that ground, its power to exercise the right of eminent domain for the promotion of the public purposes is challenged, the contention being that, when such purposes are so blended, the want of power to exercise the right of eminent domain for the private purpose excludes its exercise for any public use; but the question whether the exercise of the right of eminent domain is to be denied or withheld is not to be tested solely by the description of the objects and purposes set forth in the articles of incorporation. It may be governed by evidence aliunde showing the actual purpose in view. Matter of Niagara Falls and Whirlpool Railway Company, 108 N. Y., 375; 15 N. E., 429. 'The fact that the charter powers of a corporation to which the power of eminent domain has been delegated embrace both private purpose and public use does not deprive it of the right of eminent

domain in the promotion of the public use.' 15 Cyc., 579; Lake Keon Nav. I. and R. Company v. Klein, 63 Kan., 484; 65 Pac., 684; Cole v. County Commissioners, 78 Me., 532; 7 Atl., 397; Brown v. Gerald, 100 Me., 351; 61 Atl., 785. Cases are cited which are said to hold the contrary; but they are all cases in which there is absence of proof of the actual purpose of the plaintiff in the condemnation proceedings to sever the public use from the private use, and to exercise the right of eminent domain solely for the former. * * * * We find no case which holds that the bare fact that a corporation has in enumerating its functions expressed a purpose of engaging in a private enterprise as well as serving a public use shall deprive it of the right to exercise eminent domain for the public use. Not only is there no authority for such a proposition, but there is no reason for it. Why should the fact that the defendant in error here was incorporated under articles giving it the power to serve a private use be an obstacle to its condemnation of property for a public service? The fact that it has such power imposes no greater or additional burden or servitude upon the property which it seeks and proposes to take for the public use only."

Here, then, we have the rather remarkable situation that the counsel for the plaintiffs in error cite as an authority a case which distinctly states that no decision has ever been rendered by any Court sustaining the view maintained by them.

In order to show how completely in accord we are with the counsel for plaintiffs in error as to the law on this aspect of the case, we quote and make our own

the paragraph, with citations, found at the bottom of page 30 of the brief of the plaintiffs in error, as follows:

> "Where both private purposes and public uses are contemplated in the articles of incorporation, the question whether the right to condemn is to be denied or withheld is not tested solely by the objects and purposes set forth in the articles of incorporation, but may be governed by evidence aliunde showing the actual purpose in view."
>
> "Lake Koen Nav. I. and R. Company v. Klein, 63 Kans., 484; 65 Pacific, 548.
>
> Cole v. County Commissioners, 78 Me., 532; 7th Atl., 397.
>
> Brown v. Gerald, 100 Me., 351; 61 Atl., 785."

The only other case relied upon by counsel for plaintiffs in error to which we desire to call attention is the case of State ex rel. Harris v. Superior Court, 42 Wash., 660 (5 L. R. A. [N. S.], 672). Counsel, referring to this case, say: "This last case is very much in point." Upon examining the case, however, we find that the main holding of the Court is that a company generating electricity by waterpower and selling it to the public is not engaged in a public business for which it can exercise the right of eminent domain.

Over against this we refer to the case of **Mount Vernon-Woodbury Cotton Duck Company v. Alabama I. P. Company,** 240 U. S., 30 (60:507), in which this Honorable Court said:

> "The principal argument presented that is open here, is that the purpose of the condemnation is not a public one. The purpose of the Power Company's incorporation, and that for which it seeks to condemn property of the plaintiff in error,

is to manufacture, supply, and sell to the public, power produced by water as a motive force. In the organic relations of modern society, it may sometimes be hard to draw the line that is supposed to limit the authority of the Legislature to exercise or delegate the power of eminent domain. But to gather the streams from waste, and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that purpose is not public, we should be at a loss to say what is. The inadequacy of use by the general public as a universal test is established. Clark v. Nash, 198 U. S., 361; 49 L. Ed., 1085; 25 Sup. Ct. Rep., 676; 4 Ann. Cas., 1171; Strickley v. Highland Boy Gold Mining Company, 200 U. S., 527, 531; 50 L. Ed., 581, 583; 26 Sup. Ct. Rep., 301; 4 Ann. Cas., 1174. The respect due to the judgment of the State would have great weight if there were a doubt. Hairston v. Danville and Western Railroad Company, 208 U. S., 598, 607; 52 L. Ed., 637, 641; 28 Sup. Ct. Rep., 331; 13 Ann. Cas., 1008; O'Neill v. Leamer, 239 U. S., 244, 253, ante, 249, 265; 36 Sup. Ct. Rep., 54. But there is none. See Otis Company v. Ludlow Manufacturing Company, 201 U. S., 140, 151; 50 L. Ed., 696, 705; 26 Sup. Ct. Rep., 353. We perceive no ground for the distinction attempted between the taking of rights below the contemplated dam, such as these are, and those above. Compensation is provided for according to rules that the Court below declares to be well settled, and that appear to be adequate."

The Supreme Court of North Carolina has ruled in accord with the decision of this honorable Court last quoted, and we may confidently rest in the assumption that this Court will not overrule the Supreme Court of North Carolina on this point, in which that Court is in accord with this Court, altho there may be other Courts, such as those relied upon in the brief of counsel for plaintiffs in error, that have made contrary rulings.

WHAT IS A PUBLIC USE?

The Supreme Court of North Carolina has necessarily held in this case that the uses which the defendant in error proposes to make of the property rights acquired by condemnation are public uses, and are such uses as entitled this corporation to exercise the right of eminent domain. This is, after all, the crucial question that is before the Court; and we submit that no reason worthy of serious consideration has been advanced which could lead this Court to overrule the decision of the Supreme Court of North Carolina, and to hold that the defendant in error cannot exercise the right of eminent domain for the purposes set forth in the petition.

The reports of this Honorable Court are full of cases in which efforts have been made to have this Court overrule the decisions of various State Courts in respect to the question as to what constitutes public purposes for which corporations could exercise the right of eminent domain, but in not a single instance has this Court ever overruled or reversed the decision of a State Court, where any such State Court has held that a certain purpose was a public purpose, in the carrying out of which a corporation had the right to exercise the power of eminent domain.

Nowhere is this more clearly stated than in the opinion in **Hairston v. Danville, etc., Railroad Company**, 208 U. S., 598; 13 A. & E. (Ann. Cas.), 1008, where it is said:

> "We proceed to consider whether the uses of the spur track for which the land was taken were private, and therefore such uses for which a taking by the right of eminent domain is forbidden by the Fourteenth Amendment. The Courts of the States, whenever the question has been presented to them for decision, have without exception held that it is beyond the legislative power to take, against his will, the property of one and give it to another for what the Court deems private uses, even tho full compensation for the taking be required. But, as has been shown by a discriminating writer (1 Lewis on Eminent Domain, 2d ed., Sec. 157), the decisions have been rested on different grounds. Some cases proceed upon the express and some on the implied prohibitions of State Constitutions, and some on the vaguer reasons derived from what seems to the judges to be the spirit of the Constitution, or the fundamental principles of free government. The rule of State decisions is clearly established, and we have no occasion here to consider the varying reasons which have influenced its adoption. But when we come to inquire what are public uses for which the right of compulsory taking may be employed, and what are private uses for which the right is forbidden, we find no agreement, either in reasoning or conclusion. The one and only principle in which all Courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question. The

determination of this question by the Courts has been influenced in the different States by considerations touching the resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people. In all these respects, conditions vary so much in the States and Territories of the Union that different results might well be expected. Some cases illustrative of the tendency of local conditions to affect the judgment of Courts are: Hays v. Risher, 32 Pa. St., 169; Boston, etc., Mill-Dam Corporation v. Newman, 12 Pick. (Mass.), 467; 23 Am. Dec., 622 (conf. Lowell v. Boston, 111 Mass., 454; 15 Am. Rep., 39); Turner v. Nye, 154 Mass., 579; 88 N. E., 1048; 14 L. R. A., 487; ex p. Bacot, 36 S. C., 125; 15 S. E., 204; 16 L. R. A., 586; Dayton Gold, etc., Mining Company v. Seawell, 11 Nev., 394; Hand Gold Mining Company v. Parker, 59 Ga., 419; Head v. Amoskeag Manufacturing Company, 113 U. S., 9; 5 S. Ct., 441; 28 U. S. (L. Ed.), 889; Clark v. Nash, 198 U. S., 351; 25 S. Ct., 676; 49 U. S. (L. Ed.), 1085; Strickley v. Highland Boy Gold Mining Company, 200 U. S., 527; 26 S. Ct., 301; 50 U. S. (L. Ed.), 581; Otis Company v. Ludlow Manufacturing Company, 201 U. S., 140; 26 S. Ct., 353; 50 U. S. (L. Ed.), 696. The propriety of keeping in view by this Court, while enforcing the Fourteenth Amendment, the diversity of local conditions, and of regarding with great respect the judgments of the State Courts upon what should be deemed public uses in that State, is expressed, justified, and acted upon in Fallbrook Irrigation District v. Bradley, **ub. sup.**; Clark v. Nash, **ub. sup.**; and

Strickley v. Highland Boy Gold Mining Company, **ub. sup.** What was said in these cases need not be repeated here. **No case is recalled where this Court has condemned as a violation of the Fourteenth Amendment a taking upheld by the State Court as a taking for public uses in conformity with its laws.** In Missouri Pacific Railroad Company v. Nebraska, ub. sup., it was pointed out (page 416) that the taking in that case was not held by the State Court to be for public uses. We must not be understood as saying that cases may not arise where this Court would decline to follow the State Courts in their determination of the uses for which land could be taken by the right of eminent domain. The cases cited, however, show how greatly we have deferred to the opinions of the State Courts on this subject, which so closely concerns the welfare of their people. We have found nothing in the Federal Constitution which prevents the condemnation by one person for his individual use of a right-of-way over the land of another for the construction of an irrigation ditch; of a right-of-way over the land of another for an aerial bucket line; or of the right to follow the land of another by the erection of a dam. It remains for the future to disclose what cases, if any, of taking for uses which the State Constitution, law, and Court approve will be held to be forbidden by the Fourteenth Amendment to the Constitution of the United States."

In this connection, for a clear and concise statement of the reasons which control the Courts in determining whether a certain use is a public use, we refer to the case of **Talbot v. Hudson,** 16 Gray (Mass.), 417, where the Court says:

"It has never been deemed essential that the entire community, or any considerable portion of it, should directly enjoy or participate in an improvement or enterprise in order to constitute a public use, within the true meaning of these words as used in the Constitution. Such an interpretation would greatly narrow and cripple the authority of the Legislature, so as to deprive it of the power of exerting a material and beneficial influence on the welfare and prosperity of the State. In a broad and comprehensive view, such as has been heretofore taken of the construction of this clause of the Declaration of Rights, everything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the State, or which leads to the growth of towns and creation of new sources for the employment of private capital and labor, indirectly contributes to the general welfare and to the prosperity of the whole community. It is on this principle that many of the statutes of this commonwealth, by which private property has heretofore been taken and appropriated to a supposed public use, are founded. Such legislation has the sanction of precedents coeval with the origin and adoption of the Constitution, and the principle has been so often recognized and approved as legitimate and constitutional, that it has become incorporated into our jurisprudence."

WATERS AND WATER RIGHTS MATTERS FOR STATE LEGISLATION

In nothing has this Court yielded more to the legislative enactments and judicial decisions of the several

States than in reference to the use of the waters flowing thru the State; and no decision that we know of can be found in which this Court has overturned a legislative enactment or a State decision in regard to the use that may be made of the waters flowing thru a State, excepting only in the case of the waters of a navigable stream. As illustrating the extent to which this Court has gone in this respect, we call attention to the case of **United States v. Rio Grande Dam and Irrigation Company,** 174 U. S., 690 (43: 1136); in which the Court, after laying down the common law rule as to riparian rights, says:

> "While this is undoubted, and the rule obtains in those States in the Union which have simply adopted the common law, it is also true that, as to every stream within its dominion, a State may change this common-law rule, and permit the appropriation of the flowing waters for such purposes as it deems wise. Whether this power to change the common-law rule and permit any specific and separate appropriation of the waters of a stream belongs also to the Legislature of a Territory, we do not deem it necessary for the purposes of this case to inquire. We concede, **arguendo,** that it does.
>
> "Altho this power of changing the common-law rule as to streams within its dominion undoubtedly belongs in each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State can not by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property. Second, that

it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the general government over interstate commerce, and its natural highways, vests in that government the right to take all needed measures to preserve the navigability of the navigable water-courses of the country, even against any State action. It is true there have been frequent decisions recognizing the power of the State, in the absence of Congressional legislation, to assume control of even navigable waters within its limits, to the extent of creating dams, booms, bridges, and other matters which operate as obstructions to navigability. The power of the State to thus legislate for the interests of its own citizens is conceded, and until in some way Congress asserts its superior power, and the necessity of preserving the general interests of the people of all the States, it is assumed that State action, altho involving temporarily an obstruction to the free navigability of a stream, is not subject to challenge. A long list of cases to this effect can be found in the report of this Court. See, among others, the following: Wilson v. Blackbird Creek Marsh Company, 2 Pet., 256 (7: 412); Gilman v. Philadelphia, 3 Wall., 713 (18: 96); Escanaba County v. Chicago, 107 U. S., 678 (27: 442); Williamette Iron Bridge Company v. Hatch, 125 U. S., 1 (31: 629).

"All this proceeds upon the thought that the non-action of Congress carries with it an implied assent to the action taken by the State.

"Notwithstanding the unquestioned rule of the common law in reference to the right of a lower riparian proprietor to insist upon the continuous flow of the stream as it was, and altho there has been in all the Western States an adoption or recognition of the common law, it was early developed in their history that the mining industry in certain States, the reclamation of arid lands in others, compelled a departure from the common-law rule, and justified an appropriation of flowing waters both for mining purposes and for the reclamation of arid lands, and there has come to be recognized in those States, by custom and by State legislation, a different rule—a rule which permits, under certain circumstances, the appropriation of the waters of a flowing stream for other than domestic purposes. So far as those rules have only a local significance, and affect only questions between citizens of the State, nothing is presented which calls for any consideration by the Federal Courts."

And this decision was followed up by the decision in the somewhat leading case of **Clark v. Nash,** 198 U. S., 361 (49:1086); where the Court said:

"The plaintiffs in error contend that the proposed use of the enlarged ditch across their land for the purpose of conveying water to the land of the defendant in error alone is not a public use, and that, therefore, the defendant in error has no constitutional or other right to condemn the land, or any portion of it, belonging to the plaintiffs in error, for that purpose. They argue that, altho the use of water in the State of Utah for the purposes of mining or irrigation or manufacturing may be a public use where the right

to use it is common to the public, yet that no individual has the right to condemn land for the purpose of conveying water in ditches across his neighbor's land, for the purpose of irrigating his own land alone, even where there is, as in this case, a State statute permitting it.

"In some States, probably in most of them, the proposition contended for by the plaintiffs in error would be sound. But whether a statute of a State permitting condemnation by an individual for the purpose of obtaining water for his land or for mining should be held to be a condemnation for a public use, and therefore a valid enactment, may depend upon a number of considerations relating to the situation of the State and its possibilities for land cultivation, or the successful prosecution of its mining or other industries. Where the use is asserted to be public, and the right of the individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the State, where the right of condemnation is asserted under a State statute, we are always, where it can fairly be done, strongly inclined to hold with the State Courts, when they uphold a State statute providing for such condemnation. The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private. Those facts must be general, notorious, and acknowledged in the State, and the State Courts may be assumed to be exceptionally familiar with them. They are not the subject

of judicial investigation as to their existence, but the local Courts know and appreciate them. They understand the situation which led to the demand for the enactment of the statute, and they also appreciate the results upon the growth and prosperity of the State which, in all probability, would flow from a denial of its validity. These are matters which might properly be held to have a material bearing upon the question whether the individual use proposed might not in fact be a public one. * * * * This Court has stated that what is a public use may frequently and largely depend upon the facts surrounding the subject, and we have said that the people of a State, as also its Courts, must, in the nature of things, be more familiar with such facts, and with the necessity and occasion for the irrigation of the lands, than can anyone be who is a stranger to the soil of the State, and that such knowledge and familiarity must have their due weight with the State Courts. **Fallbrook Irrigation District v. Bradley,** 164 U. S., 112, 159; 41 L. Ed., 369, 388; 17 Sup. Ct. Rep., 56. It is true that in the Fallbrook case the question was whether the use of the water was a public use, when a corporation sought to take land by condemnations under a State statute for the purpose of making reservoirs and digging ditches to supply landowners with the water the company proposed to obtain and save for such purpose. This Court held that such use was public. The case did not directly involve the right of a single individual to condemn land under a statute providing for that condemnation.

"We are, however, as we have said, disposed to agree with the Utah Court with regard to the validity of the State statute which provides, under the circumstances stated in the Act, for the condemnation of the land of one individual for the purpose of allowing another individual to obtain water from a stream in which he has an interest, to irrigate his land, which otherwise would remain absolutely valueless."

In **Head v. Amoskeag Company,** 113 U. S., 9 (28: 889), this Court considered the New Hampshire statute which allowed the owners of a private manufacturing enterprise to erect a dam and back water upon the proprietors above, upon payment of damages.

The statute was attacked upon the ground that it allowed the appropriation of private property by private corporations for private purposes against the will of the owners. This Court held otherwise, and said:

"We prefer to rest the decision of this case upon the ground that such a statute, considered as regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed, with a due regard to the interests of all, and to the public good, is within the constitutional power of the Legislature. When property, in which several persons have a common interest, can not be fully and beneficially enjoyed in its existing condition, the law often provides a way in which they may compel one another to submit to measures necessary to secure its beneficial enjoyment, making equitable compensation to any whose control of or interest in the property is thereby modified. * * * *

"The right to the use of running water is **publici juris,** and common to all the proprietors of the bed and banks of the stream from its source to its outlet. Each has a right to the reasonable use of the water as it flows past his land, not interfering with a like reasonable use by those above or below him. One reasonable use of the water is the use of the power, inherent in the fall of the stream and the force of the current, to drive mills. That power can not be used without damming up the water and thereby causing it to flow back. If the water thus dammed up by one riparian proprietor spread over the lands of others, they could at common law bring successive actions against him for the injury so done them, or even have the dam abated. Before the Mill Acts, therefore, it was often impossible for a riparian proprietor to erect a mill and use the waterpower of the stream, provided he does not interfere with an earlier exercise by another of a like right, or with any right of the public; and to substitute, for the common-law remedies of repeated actions for damages and prostraction of the dam, a new form of remedy, by which anyone whose land is flowed can have assessed, once for all, either in a gross sum or by way of annual damages, adequate compensation for the injury.

" . . . . It is not a right to take and use the land of the proprietor above against his will, but it is an authority to use his own land and water privileges to his own advantage, and for the benefit of the community. It is a provision by law for regulating the rights of proprietors on one and the same stream from its rise to its outlet, in a

manner best calculated, on the whole, to promote and secure their common rights in it. . . . .

"Being a constitutional exercise of legislative power, and providing a suitable remedy, by trial in the regular course of justice, to recover compensation for the injury to the land of the plaintiff in error, it has not deprived him of his property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States."

In almost every State in the Union, including the state of North Carolina, there have been passed what are known as "Mill-Dam Acts," allowing the erection of mills for useful purposes along the streams, and the damming of the waters and ponding them back upon the riparian owners against the will of such owners, providing, always, the method of having a jury compensate such owners.

See Pell's Revisal of 1908 (N. C.), Sec. 2141, and numerous decisions of North Carolina Supreme Court sustaining and upholding these acts.

LOCAL CONDITIONS MUST BE CONSIDERED

This Court has emphasized in many cases the necessity of taking into consideration the local conditions and surroundings in determining the question as to whether acts of the Legislature and decisions of the State Courts should be upheld, which allow condemnation of property rights for certain uses.

When the local conditions obtaining in Western North Carolina are considered, it will be found that this mountainous section of the State abounds in very fine streams, but frequently the country thru which these streams flow is so precipitous as that **no use can be made of the country or of the streams except for**

the development of waterpowers. The evidence in this very case shows that Green River runs thru a narrow gorge in the mountains, and that it can not be used for any purpose whatever except for a waterpower. The Supreme Court of North Carolina has held that where two opposite riparian owners each own to the thread of the stream, one of them may acquire by condemnation the right to use the entire waters of the stream. If this high Court should reverse the ruling of the Supreme Court of North Carolina, the effect of the decision would be necessarily, though not intentionally, to block the development of the resources of the State. Such a decision would enable a person or corporation desiring to obstruct a proposed waterpower development, to acquire an ownership in part of the stream, and in this way prevent the development of a waterpower which might be utilized to distribute electricity for manufacturing and other useful purposes.

We refer to a few of the cases from this Court, holding that the local conditions must be considered in passing upon the constitutionality of certain acts of State Legislatures.

In **Strickley v. Highland Boy Gold Mining Company,** 200 U. S., 527, this Court, in upholding a statute of the State of Utah giving a right of condemnation for a right-of-way across a placer mining claim for the bucket line of a mining corporation, as not being in violation of the Fourteenth Amendment of the Constitution, says: "In the opinion of the Legislature and the Supreme Court of Utah, the public welfare of the State demands that aerial lines between the mines upon its mountain sides and the railways in the valleys below should not be made impassable by the refusal of a private owner to sell the right to cross his

land. The Constitution of the United States does not require us to say they are wrong." If the State of Utah can prescribe such a rule of property for the citizens of that State, which is recognized and approved by this Court, why can not the State of North Carolina with equal right prescribe a rule of property such as is contended for in the case now before this Court? Conditions in the mining camps of Utah, where the only value that the mountain property has is its precious ore, are very similar to the conditions in Western North Carolina, where the property in controversy in this case lies, and its only value is that which it has as a waterpower. "When the natural conditions in a State are such that, unless the owners of wild and uncultivated lands can be compelled to yield their undoubted property rights in such a way as to enable their neighbors to make use of the natural resources of their lands, the development of the State will come to a stop." Ruling Case Law, Volume 10, page 46.

Upon the same principle, this Court has recognized as valid acts of the different States of the Union in regard to draining marshy land. In Wurts v. Hoagland, 114 U. S., 229, a statute of New Jersey providing for the drainage of marshy lands (private property) within the State, by condemnation, was held not to be in violation of the Fourteenth Amendment. In O'Neill v. Leamer, 239 U. S., 244, this Court says: "We have repeatedly said that the provisions of the Fourteenth Amendment, embodying fundamental conceptions of justice, can not be deemed to prevent a State from adopting a public policy for the irrigation of arid lands or the reclamation of wet or overflowed lands. States may take account of their special exigencies, and when the extent of their arid or wet

lands is such that a plan of irrigation or reclamation according to districts may fairly be regarded as one which promotes the public interest, there is nothing in the Federal Constitution which denies to them the right to formulate this policy, or to exercise the power of eminent domain in carrying it into effect. With the local situation, the State Court is peculiarly familiar, and its judgment is entitled to the highest respect."

IF USES ARE BOTH PUBLIC AND PRIVATE, RIGHT OF CONDEMNATION NEVERTHELESS PERMITTED

It will be noted that the only strength in the position of counsel for plaintiffs in error is that this Court should overrule the Supreme Court of North Carolina merely because the defendant in error has under its charter power to engage in manufacturing enterprises along with its public functions.

If it were necessary to do so, we might well contend that even if it was the intention of the Blue Ridge Interurban Railway Company to engage solely in manufacturing enterprises, and it owned one-half of this gorge thru which Green River runs, and desired to obtain leave to use the entire stream upon compensating the plaintiffs in error, it would be entirely constitutional for the Legislature of North Carolina to give to such a manufacturing enterprise having already a part ownership in the stream, the right to use the entire waters of the stream for developing a waterpower for manufacturing purposes, provided only compensation was made to the owner of the other interest in the stream.

In this case, however, as we have already shown, it was found by the Court that the purposes of this

condemnation proceeding was in furtherance of the public purposes set forth in the petition in the Court below. It is not contended by the plaintiffs in error that the sole purpose of this condemnation proceeding was to engage in private enterprises, but it is contended (without any evidence to support such contention) that it is the purpose of the defendant in error to engage in both public and private business, and to use the electricity developed both for public and private enterprises.

We could well meet them upon their own battleground, if it were necessary; and we have no doubt of our ability to show this Court that it is no violation of the Fourteenth Amendment to permit the taking of the property where such taking is both for public and private use. No more striking case illustrating this position can be found than that of **Hairston v. Danville and Western Railroad Company,** 208 U. S., 598, in which the owner of certain land contested the right of the Railroad Company to condemn a right-of-way over his land because the right-of-way was to be used for the location of a spur track running to a tobacco factory. This Court, in rendering the opinion, says: "Here the proposed track would be used, and was designed to be used, not only for cars of the Tobacco Company, but for the storage of cars to be laden or unladen by receivers and shippers of freight, to relieve the congestion of business, which thru the growth of the town overburdened the limited trackage of the railroad." In this case last quoted from, it was admitted that the owner of the Tobacco Factory had contributed in paying the expenses of running the spur track to his factory, and that the spur track was to be used in a large part for the private uses of this tobacco factory. This Honor-

able Court held, however, that the mere fact that part of the uses to which the spur track was to be put was private did not prevent the right of condemnation by the railroad company, and this Court upheld the decision of the Court of Appeals of Virginia to the effect that this was a public use, altho in part the track was to be devoted to private uses.

Applying this decision to our own case, we may confidently maintain that if this waterpower development is made to operate an interurban railway company, and to sell electricity, then the right of condemnation would not be denied it, even tho it should be admitted that in addition to this public use it was the intention of the company to use electricity in operating manufacturing plants.

CONCLUSION

From all these considerations, it is confidently submitted that this Court should find no difficulty in reaching the following conclusions:

1. The Superior Court in which the action was originally tried found as a fact that this condemnation proceeding was for a public use, and this finding of the Court below is conclusive—particularly so in view of the fact that there was no objection or exception to the finding of the Court.

2. The fact that the defendant in error has power in its charter to engage in private business does not, under the laws of North Carolina, prevent the corporation from exercising the power of eminent domain; but the remedy in North Carolina is by **"quo warranto** or otherwise" to prevent the corporation from making any illegal or improper use of any rights which it may acquire by virtue of the exercise of the power of eminent domain.

3. All the questions involved in a consideration of this case were questions within the province of the State Legislature and the State Supreme Court, and even if the extreme view of the facts is taken, as presented by counsel for plaintiffs in error, nevertheless the decision of the Supreme Court of North Carolina does not in any way violate any provision of the Fourteenth Amendment.

It is therefore respectfully submitted that this Court should dismiss the writ, or affirm the judgment of the Supreme Court of North Carolina.

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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 497.

HENDERSONVILLE LIGHT & POWER COMPANY, AND SALUDA-HENDERSONVILLE INTERURBAN RAILWAY COMPANY,
PLAINTIFFS IN ERROR,

vs.

BLUE RIDGE INTERURBAN RAILWAY COMPANY,
DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

SUPPLEMENTAL BRIEF OF COUNSEL FOR PLAINTIFFS IN ERROR.

The former brief filed by the plaintiffs in error in this case on the motion of the defendant in error to dismiss this case, or to affirm the judgment of the Supreme Court of North Carolina, contains a brief statement of the case, pages 1 to 10, and the assignments of error, pages 10 to 16, as required by the rules of this Court, and, therefore, these will not be repeated in this supplemental brief.

MOTION TO DISMISS.

The motion to dismiss this case for want of jurisdiction in this Court will not be further argued, but reliance will be placed on the original brief, pages 21 to 28, which was heretofore filed.

MERITS OF THE CASE.

In the previous brief filed by us on the motion to af-

firm, we set out the facts of the case, see pages 1 to 10, and an analysis of some of the testimony, pages 16 to 21. These are respectfully referred to.

NO NECESSITY TO CONDEMN.

As argued by us in the previous brief, this record, as we insist, fails to make out a case of necessity to condemn the property of the plaintiffs in error, and for that reason the assignment of error XII, record, page 7, exception No. 2, in State Court, record, pages 70 and 82, should be sustained.

An examination of the Statutes of North Carolina, under which this case was brought, which were fully set out on pages 22 and 23 of the brief filed on the motion to dismiss or affirm, will disclose that before land can be condemned the *necessity* for such condemnation must exist. Chapter 302 of the laws of 1907 of North Carolina, as amended by Chapter 94 of the laws of 1913, provides, among other things, as follows: "and whenever such company (street or interurban railway company) shall not own the entire water front, or all of the lands, water rights or other easements necessary to be used in fully developing such water power, then such railway company shall have the power to acquire any other lands, water rights or easements which may be needed to fully develop such power," by condemnation. The other Statute, Chapter 74, Laws of 1907, which is quoted in full on page 23 of the previous brief authorizes the taking of "such lands as may be necessary." Thus it is seen that under the Statutes of North Carolina, the necessity for the taking must first exist.

ALLEGATIONS OF NECESSITY TO CONDEMN ARE INSUFFICIENT.

It is fundamental that allegations and proof are indispensable.

There must be *allegata et probata,* and under the new system as under the old, the court cannot take notice of

any proof, unless there be a corresponding allegation. Proof without allegations is as ineffective as allegations without proof.

McKee v. Lineberger, 69 N. C., 217, 239;
Abernathy v. Seagle, 98 N. C., 553, 556.

We insist that the allegations in this case are not sufficient. Let us analyze the petition to condemn, which is set out in the record, pages 14 to 16. This petition sets out in paragraph one, the powers of the defendant in error as contained in its charter, in short, as follows:

(a) The power to build and operate a street and interurban railway.

(b) The power to erect and maintain a water power plant to generate electricity to operate said railway.

(c) The power to condemn, with the right to sell surplus electric power generated by its plant.

(d) The power to construct buildings, works, factories, plants, install machinery therein, and to operate the same, to such extent as may be necessary for the proper prosecution of the objects of the corporation.

In paragraph two it is alleged to be the intention of the petitioner to carry on the business authorized by its charter; and that as evidence of good faith it has purchased lands and water powers of a value in excess of $200,000.00; has engaged skilled engineers "who have made the most definite and accurate surveys, calculations and estimates necessary to the development of said water power," and that when said developments are completed, they will produce 50,000 H. P.

In Section three it is alleged that it is the purpose and intention of the petitioner to build and operate a street and interurban railway as a common carrier.

In section four it is alleged "that in order to operate said railway it is necessary for the petitioner to generate electric power by developing same on Green River," *"and in order to fully develop said power according to the plans of the said engineers, it is necessary to construct a dam about one hundred and fifty feet in height,*

on the petitioner's property," and divert the water by so doing from the lands of the plaintiffs in error.

The fifth and sixth paragraphs allege the ownership by the plaintiffs in error of the lands sought to be condemned.

The ninth paragraph of the petition is the only other one which bears on the question under discussion, and in that it is alleged *"that the said petitioner, in order to make the developments hereinbefore mentioned, will have to obstruct said river and divert the water therefrom above the lands of the said defendants* (plaintiffs in error) *by means of its dam and flume, which said developments cannot be made without the obstruction and diversion of said water."*

Now, plainly, the developments referred to in the last paragraph of the petition, and the developments referred to in the fourth paragraph of the petition, and the developments referred to in the second paragraph of the petition, are the same. That is, the developments necessary to fully utilize all of the waters of said stream "according to the plans of its said engineers" "which when completed will produce, approximately, 50,000 H. P."

It is nowhere alleged that it is necessary to condemn the lands of the plaintiffs in error in order to operate the proposed railway, and it is absurd and ridiculous to insist that the defendant in error has spent over $200,000.00 for lands and water power on Green River, as alleged by them, and find it is necessary to develop 50,000 H. P., to operate a few miles of electric railroad, which exists only in the imagination, and to operate which, as testified to by the Secretary and Treasurer of the defendant in error, see page 26, it will not take more than 1,000 H. P.

It is alleged in the petition, page 15, that in order to operate said railroad it is necessary for the petitioner to generate electric power by developing same on Green River, but certainly that is not an allegation that it is necessary to condemn the property of the plaintiffs in error in order to operate said railway.

Attention is particularly called to the fact that the

defendant in error proposes to engage in only one public business—that is, the operation of an electric railroad.

Where there is no necessity to condemn the courts will withhold the right to condemn.

Curtis on Electricity, Sec. 81;
State v. White River Power Co., 39 Washington, 648, 82 Pac., 150;
2 L. R., N. S., 842.

All the allegations of the petition were denied in the answer. See Record, pages 17 to 21.

NECESSITY TO CONDEMN REFUTED BY THE TESTIMONY.

Particular attention of the Court is called to the "Explanation of Diagram" and the "Diagram Illustrating Proposed Water Power Development of Blue Ridge Interurban Railway Company" attached to the brief of the defendant in error on its motion to dismiss or affirm in this case, together with testimony bearing thereon. It will be observed by an examination of this diagram that the defendant proposes to build a dam across Green River at the letter "B" on the diagram, and divert all of the waters of the stream from the lands of the plaintiffs in error, and carry the same through a flume to a point below the lands of the plaintiffs in error at the proposed power house, at the letter "E." The plans of the defendant in error, as testified to, contemplate the building of a dam 142 to 150 feet in height, pages 15, 32, 34, 35, and the carrying of the water by means of a pipe to the power house below, a distance of three miles, which would in that way produce 58,000 H. P. The proposed dam would overflow something over 200 acres of land, record, page 24. The witness of the defendant in error, George E. Ladshaw, testified that the distance along the front of the property proposed to be condemned was just half a mile, with 218 feet fall, record, page 34. Substantially the same testimony was given by defendant's witness Lee, page 41, where he says the fall of the Torrence property is 218

feet. R. M. Oates, witness for plaintin, testified, page 54, that the river front on the narrows (the property to be condemned) had a fall of 219 feet. The same testimony, in substance, is found on pages 62 and 78. So we have this situation: A dam at "B" on the defendant's diagram, above the property of the plaintiffs in error which is to be 142 feet in height. There is a fall from "B" to "E" of 218 feet. So the total head at "E" would be 360 feet. According to the testimony of defendant in error, the power developed at "E" would be from 50,000 to 60,000 H. P. Now, if a stream with a head of 360 feet, develops 50,000 H. P., then by the well-known laws of hydraulics, the same stream with a head of 142 feet at "B" would develop 19,722 horse power, disregarding the small difference that would arise from friction, or loss of power in the distance.

We thus see from this statement that *the defendants in error can develop, according to their own testimony, practically* 20,000 *H. P. at "B," permitting the water to flow undisturbed* by the lands of the plaintiffs in error, and that 20,000 H. P. is *TWENTY times* as much power as is necessary to operate their alleged electric railway. Under such circumstances, *where is the necessity to condemn the property of the plaintiffs in error for the alleged public use?*

PURPOSES OF CONDEMNATION NOT ALL PUBLIC.

In the previous brief filed on the motion to dismiss or affirm, the above argument is presented and authorities cited to show that in no view of the record in this case, can it be said that it was the purpose of the defendant in error to condemn the property of the plaintiffs in error, solely for public uses. See pages 29 to 43 of the previous brief, and authorities cited.

This argument is based on the lack of sufficient allegations in the petition, the lack of sufficient proof in the testimony, and a lack of the sufficient finding by the Court to sustain the judgment below. Particular attention is called

to the testimony in the case as set out in the record, pages 24 to 27, 32, 37, 43, 44, and to the analysis of the testimony set out on pages 16 to 21 of the previous brief. Attention is also especially called to the judgment rendered in the case in the Superior Court and affirmed in the Supreme Court of North Carolina, which is set out in the record on page 81, in which it is adjudged "that the rights sought to be condemned in the petition in this cause, that is, the right to divert Green River from the lands of the respondents as set forth in the petition be condemned to the use of the petitioner for the purposes set forth in the petition."

THE JUDGMENT DEPRIVES THE PLAINTIFFS IN ERROR OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

Assignment of error No. XII, record, page 7, Exception No. 2 in State Court, record, pages 70 and 82, should be sustained because the property of the plaintiffs in error was condemned for other than public purposes.

Recognizing the fact that this Court has decided in a number of cases that the judgment of a state Court on the question as to what is a public use, will be largely respected, we call the Court's special attention to one of the leading cases in North Carolina, bearing on this subject, which is Cozard v. Hardwood Company, reported in 139 N. C., at page 283. In this case the Supreme Court of North Carolina declared unconstitutional a statute which authorized the owners of timber lands to condemn a right of way for tramways or railways, over the lands of other owners, for the use of the owners of the timber, in that, such statute, if upheld, would authorize the taking of private property for a private use. While we do not insist that the above case is directly in point on the question involved in the instant case, still the decision in Cozard v. Hardwood Company, shows the attitude of the Supreme Court of North Carolina on this question.

We are frank also to confess that it seems from the record in this case that the Supreme Court of North Car-

olina, in construing the case now under review, either overlooked, or ignored, the contention of the plaintiffs in error that the judgment sought to be reversed, deprived them of their property without due process of law, because it authorized their lands to be condemned for other than public purposes. However this may be, under a long line of decisions of this Court, some of which are cited in the previous brief, and will not here be repeated, as this question was raised in the Court below, and as it involved a Federal right, a right of property protected by the Constitution of the United States, and the decision of the Court was against the Federal right claimed by the plaintiffs in error, it is subject to review by this Honorable Court.

Yazoo & Miss. Valley R. R. Co. v. Adams, 180 U. S., page 1;
Chapman v. Goodnow, 123 U. S., 540, 548.

See also cases cited on page 26 of our brief on motion to dismiss or affirm.

Counsel for the defendant in error seems to have taken the view that it was our contention, that because the Charter of the defendant in error professed to authorize it to condemn property for private uses, it could not, therefore, condemn property for the public uses specified in the charter, and cited Land Company v. Traction Company, 162 N. C., page 314 as deciding to the contrary. We have not taken that position. *What we insist is that the power to condemn cannot be exercised for the private purposes mentioned in the certificate of incorporation of the defendant in error, and in the petition for condemnation in this case, and that there is no separation of such purposes in this case.*

In addition to the authorities referred to in our former brief, we desire to call the Court's attention to the following further authorities. In the case of State v. White River Power Company, *supra,* the Court quotes at length from Healy Lumber Co. v. Morris, 33 Wash, 490, 63 L. R. A., 820, 99 Am. St. Rep., 964, 74 Pac. 681, as follows:

"Public use means the same as use by the public, and

this, it seems to us, is the construction the words should receive in the constitutional provision in question. The reasons which incline us to this view are: First, that it accords with the primary and more commonly understood meaning of the words; second, it accords with the general practice in regard to taking private property for public use, in vogue when the phrase was first brought into use in the earlier Constitutions; third, it is the only view which gives the words any force as a limitation, or renders them capable of any definite and practical application. If the Constitution means that private property can be taken only for use by the public, it affords a definite guide to both the legislature and the Courts." Also from Cooley on Constitutional Limitations (p. 652): "Nor could it be of importance that the public would receive incidental benefits, such as usually spring from the improvements of lands or the establishment of prosperous private enterprises. The public use implies a possession, occupation and enjoyment of the land by the public at large, or by public agencies; and a due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another, on vague grounds of public benefit, to spring from the more profitable use to which the latter may devote it." And it said: "But from a consideration of all authorities, and from our own view on construction, we are of the opinion that the use under consideration must be either a use by the public, or by some agency which is quasi public, and not simply a use which may incidentally or indirectly promote the public interest or general prosperity of the state." And again: "It seems scarcely necessary to particularize to show to what extent this doctrine might practically be carried. Under such liberal construction the brewer could successfully demand condemnation of his neighbor's land for the purpose of the erection of a brewery, because, forsooth, many citizens of the state are profitably engaged in the cultivation of hops. Condemnation would be in order for grist mills, and for factories for manufacturing the cereals of the state, because there is a large agricultural interest to be sustained. Tanner-

ies, woolen factories, oil refineries, distilleries, packing houses and machine shops of almost every conceivable kind would be entitled to some consideration for the same reasons, thereby actually destroying any distinctions between public and private use; for the principle in the one instance is the same as in the other; the difference is only in degree."

In Varner v. Martin, 21 W. Va., 548, that court holds: "That before a corporation can exercise the right of eminent domain, it must possess each and all of these qualifications: First. The general public must have a definite and fixed use of the property to be condemned; a use independent of the will of the private person or private corporation in whom the title of property when condemned will be vested. A public use, which cannot be defeated by such private owners but which public use continues to be guarded and controlled by the general public through laws passed by the legislature. Second. This public use must be clearly a needful one for the public—one which cannot be given up without obvious general loss and inconvenience. Third. It must be impossible, or very difficult, at least, to secure the same public uses and purposes otherwise than by authorizing the condemnation of private property." The Court further says: "Upon the principals we have laid down, it would follow that the legislature could not authorize lands to be condemned for the erection of dams, or for the overflowing of lands by dams erected for saw mills or manufactories generally, because they obviously want the first qualification we have laid down as necessary to confer this power on the legislature. The general public have no definite and fixed use of any such mills and manufactories. They have no use of them which is independent * * * of the owners of such mills and manufactories, and they can be defeated in any sort of use of such mills and manufactories at the pleasures of the owners of them."

The Supreme Court of the State of Washington in State v. White River Power Company, *supra*, further says:

"It is not claimed there is a demand for the 50,000 electrical H. P. It is not claimed that the respondent has a franchise to enter any of the cities or towns mentioned, or that it will or can obtain one. It does not appear that there are any street or other railways to utilize this product. It is not under contract or obligation to furnish electricity to any person or for any purpose. Under its articles, it may erect and maintain, mills and manufactories, and operate the same. For aught that appears, aside from its professions and voluntary promises, it may take the relators property, generate electricity or not, at will, and use the same for any purpose, public or private, to suit its convenience."

In Board of Health against Van Hoesen, 87 Mich., 533, 14 L. R. A. 114, 49 N. W., 894, the Court said: "To justify the condemnation of land for a private corporation, not only must the purpose be one in which the public has an interest, but the state must have a voice in the manner in which the public may avail itself of that use." In Gilmer v. Lime Point, 18 Cal., 229, the public use is defined to be a use which concerns the whole community, as distinguished from a particular individual. The use which the public is to have of such property must be fixed and definite. The general public must have a right to a certain definite use of the private property on terms and for charges fixed by law, and the owner of the property must be compelled by law to permit the general public to enjoy it. It will not suffice that the general prosperity of the community is promoted by the taking of private property from the owner and transferring its title and control to a corporation, to be used by such corporation as its private property, uncontrolled by law as to its use; in other words, a use is private so long as the land is to remain under private ownership and control, and no right to its use, or to direct its management is conferred upon the public."

The situation described above is very similar to the instant case. In our case there is nothing to show that there is any present demand for any 50,000 H. P.; the de-

fendant in error has acquired no franchise to operate a street railway in any town; not one inch of the proposed line of railway has been surveyed, staked out or located; it is under no obligation to furnish electricity to any person, or for any purpose, and for all it appears, it may take the property of the plaintiffs in error, generate electricity and do absolutely as it pleases with the power thus created.

The whole truth about the matter is that the defendant in error proposes to erect a large dam, generate a large amount of electrical power, and for that purpose to condemn the property of the plaintiffs in error, and when the electric current has been generated, they expect to sell the same to cotton mills, owned by persons interested in the defendant in error and situated in South Carolina. But, however that may be, we insist that upon the entire record it appears that the proposed condemnation is not solely for public uses.

"We do not assume that these various statements, constitutional and legislative, together with the decisions of the state court, are conclusive and binding upon this court upon the question as to what is due process of law, and, as incident thereto, what is a public use. As here presented these are questions which also arise under the Federal Constitution, and we must decide them in accordance with our views of constitutional law.

"It is obvious, however, that what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned."

Fallbrook Irrigation District v. Bradley, 164 U. S., 159.

PRIVATE USE AND INCIDENTAL PUBLIC USE.

If it appear that the real purpose of the corporation is to acquire lands and streams needful, and to be used in carrying out a private enterprise, though a public use may be served, then the taking would not be permitted.

Thom v. Georgia Mfg. & Public Service Co., 128 Ga., 187; 57 S. E., 75.

The power of eminent domain cannot be exercised where the main purpose, shown by the evidence, is the attaining of a supply of water for the working of the mining claims of the plaintiffs, although the intention may also be to supply water to others for mining and irrigation purposes.

Lorenz v. Jacob, 63 Cal., 73.

Where a corporation was authorized to condemn lands for docks, wharves, basins and warehouses, and other buildings necessary for the docking and loading of vessels, and it appearing that the corporation was authorized to use a large portion of the lands so to be condemned, for its own business of maintaining docks, etc., the right to condemn was denied.

In Re: Eureka Basin Warehouse & Mfg. Co., 96 N. Y., 42.

Where both a private use and a public use exist together as main or principal purposes of the condemnation, the right of eminent domain cannot be exercised.

Lake Koen Nav. Reservoir & Irrig. Co. v. Klein, 63 Kan., 484, 65 Pac., 684.

COMBINATION OF PUBLIC USE AND PRIVATE USE AS PRINCIPAL PURPOSES.

It has been held by a number of the State Courts of the country, that where there is a combination of a public use, and of a private use as the principal purposes of the proposed condemnation, the right to condemn will be denied.

Stewart v. Great Northern R. Co., 65 Minn., 515; 33 L. R. A., 427; 68 N. W., 208;
Atty. General v. Eauclaire, 37 Wis., 400.

A statute which purports to confer the power of eminent domain for the purpose of supplying the inhabitants of a town with water and electric lights—a public use—

and supplying other persons, companies, or corporations with electric light or power—a private purpose—cannot be upheld as to either purpose, since the public and private purposes are inseparable.

Miller v. Pulaski (Va.), 63 S. E., 880.

A petition in condemnation proceedings, combining as purposes of the proceedings, the establishment of sawmills, or paper mills, with the establishment of a grist mill, was held bad.

Harding v. Goodlett, 3 Yerg, 40; 24 Am. Dec. 546.

A statute which undertakes to delegate the power of eminent domain for the purposes of mills and other machinery is unconstitutional.

Sadler v. Langham, 34 Ala., 333;

Gaylord v. Sanitary Dist., 204 Ill., 576; 63 L. R. A., 582.

In the case of matter of Mayor, etc., of New York, 135 New York, on pages 253, 259, the Court speaking through Justice Peckham, said: "Speaking in general terms, I should say that the public must under proper police regulations, have the right to resort to the land or property for the use for which it was required, independent of the mere will or caprice of any private person or corporation in whom the title of the property would vest upon condemnation. Otherwise, the use could not be public."

ASSIGNMENTS OF ERROR NOS. I TO XII,

(Record, Pages 3 to 8).

The foregoing arguments addressed to the general principles of this case, and to the errors pointed out in the several assignments of error is relied upon as to each assignment of error. The first assignment of error is addressed particularly to the attempt to take the property of the plaintiffs in error, when it is entirely off of the line of the proposed railroad, and therefore, not subject to condemnation for that purpose. The assignments of error will not be discussed in detail further, but the special

attention of the Court is called to the errors pointed out in assignment of error No. V, record, page 5, assignment of error No. VI, record, page 5, assignment of error No. VII, record, page 5, and 6, assignment of error No. VII, record, page 6, that the defendant in error proposes to take the property of the plaintiffs in error, when not necessary for any public use, and proposes to take said property for private uses, and that the alleged public use is not in any way or manner separated from the apparent private uses, for which the property is sought to be condemned.

Attention of the Court is also called to the fact that assignments of error Nos. XI and XII, record, page 7, based on Exception No. 2 in the Supreme Court of North Carolina, record, page 70, presents the question as to whether or not the proposed taking of the property of the plaintiffs in error was for a public use, exclusively, and was necessary for such public use, and whether or not it was the duty of the Court at the conclusion of the entire testimony, to enter a judgment as of non-suit, because the proposed taking of the property of the plaintiffs in error was contrary to the constitutional rights of the plaintiffs in error.

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GEO. H. WRIGHT,
Counsel for Plaintiffs in Error.

April 4, 1917.

HENDERSONVILLE LIGHT & POWER COMPANY ET AL. *v.* BLUE RIDGE INTERURBAN RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 497. Argued April 10, 1917.—Decided April 23, 1917.

Where the answer in a state condemnation case attacked the taking as a taking for private use in violation of the Fourteenth Amendment and a dissenting opinion in the state Supreme Court bore evidence that the Federal Constitution was invoked against a construction of the state laws by which the taking was justified, *Held*, that this court had jurisdiction to review.

Charter and state laws authorized a corporation to build and operate an electric railroad, to condemn water power and employ it in generating electricity for use in running the road, to sell the surplus of current so generated and, in connection with these objects, to construct buildings and factories, and operate machinery. In condemnation proceedings whereby the corporation took water rights of a riparian owner, the state court found that the purpose was in good faith to carry on the business of building and operating the road, that the taking of all the water power was necessary for that purpose, and that the purpose was public.

Held: (1) That in the absence of definite proof that a surplus would result this court could not say that sale of surplus power was the real object of the enterprise or anything more than a possible incident, necessary to prevent waste, of the railway use.

(2) Even if sale of surplus power were likely to occur, the taking, upon the case as made, would be justified by *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U. S. 30, 32.

171 N. Car. 314, affirmed.

THE case is stated in the opinion.

Mr. Michael Schenck, with whom *Mr. C. P. Sanders*, *Mr. J. C. Martin*, *Mr. Thomas S. Rollins* and *Mr. George H. Wright* were on the briefs, for plaintiffs in error:

The Laws of North Carolina (Laws 1907, c. 302; 1913, c. 94; 1907, c. 74; Pell's Revisal, 1908, § 1573) as construed by the Supreme Court of the State authorize the defendant in error to take private property for a private use in violation of the Fourteenth Amendment. This defense was set up in the answer and is necessarily involved in the decision of the Supreme Court of the State.

Necessity to condemn the property for the operation of the railroad was not alleged. Proof without allegation is ineffective. *McKee* v. *Lineberger*, 69 N. Car. 217, 239; *Abernathy* v. *Seagle*, 98 N. Car. 553, 556. Condemnation is not allowed if not necessary. Curtis on the Laws of Electricity, § 81; *State* v. *White River Power Co.*, 39 Washington, 648. The testimony refutes the idea that so much water power was needed for the railroad; the real object shown is to develop a large water power, to supply electric current for the private uses of the mills and properties owned by the stockholders of the defendant in error, and in which they are interested. Condemnation is not sought solely for public purposes. There is neither allegation, proof nor finding that the electric current is to be sold, generally, for public uses, and the case therefore does not come, as we insist, under the ruling of this court in the case of *Mt. Vernon-Woodberry Cotton Co.* v. *Alabama Power Co.*, 240 U. S. 30. Where the charter of a corporation authorizes it to exercise the power of eminent domain for both public and private purposes, the power of eminent domain cannot be exercised for the private purpose, but it may be exercised for the public purpose. *Kaukauna Co.* v. *Green Bay &c. Canal Company*, 142 U. S. 254; *Walker* v. *Shasta Power Co.*, 160 Fed. Rep. 856.

Where both private purposes and public uses are contemplated in the articles of incorporation, the question whether the right to condemn is to be denied or allowed is not tested solely by the objects and purposes set forth in the articles of incorporation, but may be governed by

evidence *aliunde* showing the actual purpose in view. *Lake Koen Nav. R. & I. Co.* v. *Klein*, 63 Kansas, 484; *Cole* v. *County Commissioners*, 78 Maine, 532; *Brown* v. *Gerald*, 100 Maine, 351; *Fallsberg Power & Mfg. Co.* v. *Alexander*, 101 Virginia, 98; *Berien Springs Water Power Co.* v. *Berien Circuit Judge*, 133 Michigan, 48; *Attorney General* v. *Eauclaire*, 37 Wisconsin, 400; *State ex rel. Harris* v. *Superior Court*, 42 Washington, 660; *Matter of Niagara Falls and Whirlpool Ry. Co.*, 108 N. Y. 375.

If a private use is combined with a public one in such a way that the two cannot or are not sought to be separated, then unquestionably the right of eminent domain could not be invoked to aid in the enterprise [citing many cases].

If it appear that the real purpose of the corporation is to acquire lands and streams needful, and to be used in carrying out a private enterprise, though a public use may be served, then the taking cannot be permitted. *Thom* v. *Georgia Mfg. & Public Service Co.*, 128 Georgia, 187; *Lorenz* v. *Jacob*, 63 California, 73; *In re Eureka Basin Warehouse & Mfg. Co.*, 96 N. Y. 42; *Lake Koen Nav. R. & I. Co.* v. *Klein*, 63 Kansas, 484.

The judgment of the state court on the question of public use should not be accepted in this case. We insist that the power to condemn cannot be exercised for the private purposes mentioned in the certificate of incorporation of the defendant in error, and in the petition for condemnation in this case, and that there is no separation of such purposes in this case. *State* v. *White River Power Co.*, 39 Washington, 648; *Varner* v. *Martin*, 21 W. Va. 548; *Board of Health* v. *Van Hoesen*, 87 Michigan, 533; *Gilmer* v. *Lime Point*, 18 California, 229.

As in *State* v. *White River Power Co.*, *supra*, so here, there is nothing to show that there is any present demand for 50,000 horse-power; the defendant in error has acquired no franchise to operate a street railway in any town; not one inch of the proposed line of railway has been sur-

veyed, staked out or located; it is under no obligation to furnish electricity to any person, or for any purpose, and for all that appears, it may take the property of the plaintiffs in error, generate electricity and do absolutely as it pleases with the power thus created. It is obvious that what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned. This court cannot be bound by the decisions of state courts on what constitutes public use. *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 159.

Mr. Charles W. Tillett, with whom *Mr. Horace L. Bomar*, *Mr. William A. Smith*, *Mr. James E. Shipman* and *Mr. Thomas C. Guthrie* were on the briefs, for defendant in error:

The fact that the Chief Justice certifies that federal questions are involved will not control, when the opinion of the court shows that no such question was involved. *Biddle* v. *Bellingham Co.*, 163 U. S. 63.

Whether the water right was available to the respondent for water power, and whether it was subject to condemnation, are purely questions of state law and not reviewable here. *Rundle* v. *Delaware & Raritan Canal Co.*, 14 How. 79; *St. Louis* v. *Rutz*, 138 U. S. 226; *St. Anthony Falls Waterpower Co.* v. *Water Commissioners*, 168 U. S. 349.

It was distinctly found, without objection or exception, that the Blue Ridge Company proposed to carry on a business of a public nature, and by turning to the original petition it will be found that this was the construction and operation of an interurban railway, and also the selling of electricity. It is difficult to see how it could be more clearly or conclusively shown that the purposes for which the power of eminent domain was invoked were public purposes and not private.

In North Carolina it is expressly held that a corporation may condemn for the public purposes of its charter, and if it applies the property to private uses the remedy is by *quo warranto*. *Wadsworth Land Co.* v. *Piedmont Traction Co.*, 162 N. Car. 314. See also *Walker* v. *Shasta Power Co.*, 160 Fed. Rep. 856; *Lake Koen Nav. R. & I. Co.* v. *Klein*, 63 Kansas, 484; *Cole* v. *County Commissioners*, 78 Maine, 532; *Brown* v. *Gerald*, 100 Maine, 351.

State ex rel. Harris v. *Superior Court*, 42 Washington, 660, in holding that sale of electricity is not a public business is overruled by *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Power Co.*, 240 U. S. 30.

In not a single instance has this court ever overruled or reversed the decision of a state court where any such court has held that a certain purpose was a public purpose, in the carrying out of which a corporation had the right to exercise the power of eminent domain. *Hairston* v. *Danville & Western R. R. Co.*, 208 U. S. 598. For a clear statement of the elements of public use see *Talbot* v. *Hudson*, 16 Gray, 417.

The regulation of the use of non-navigable streams is for the States. *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690; *Clark* v. *Nash*, 198 U. S. 361; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 159; *Head* v. *Amoskeag Co.*, 113 U. S. 9.

Where this stream flows the waters can only be used for power purposes, and to deny the right would block the development of that part of the State. The local conditions are to be considered in passing on the reasonableness and validity of the law allowing condemnation. *Strickley* v. *Highland Boy Gold Mining Co.*, 200 U. S. 527; *Wurts* v. *Hoagland*, 114 U. S. 229; *O'Neill* v. *Leamer*, 239 U. S. 244.

The mere fact that the use may be in part private does not prevent condemnation. *Hairston* v. *Danville & Western R. R. Co.*, *supra*.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a special proceeding to condemn the water rights incident to land belonging to the plaintiffs in error upon a bow of Green River. It has resulted in a judgment of condemnation subject to the payment of $10,000. The petitioner, the defendant in error, owns land on the side of the stream opposite to that of the plaintiffs in error, the respondents, and on both sides of the stream above and below that land. It proposes to cut off the bow by a dam above, and a steel flume that reënters the river below, that land, all upon its own ground. The respondents in their answer set up that the condemnation in this manner and for the purpose alleged would be the taking of private property without due process of law in violation of the Fourteenth Amendment, and we assume that the record discloses a technical right to come to this court. *Minneapolis & St. Louis R. R. Co.* v. *Minnesota*, 193 U. S. 53, 62. *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, 91. The decision of the Supreme Court in sustaining the condemnation discusses only matters of state law, but the Chief Justice, dissenting, intimated that the taking infringed the Constitution of the United States. 171 N. Car. 314.

The defendant in error, the Blue Ridge Interurban Railway Company, seems to have been incorporated with power to build and operate a street and interurban railway from Hendersonville through Saluda to a point on Green River, and to extend its lines to any other points not exceeding fifty miles from Saluda; also with power to maintain a water power plant on Green River for the purpose of generating electricity to be used in operating the railway; and with all other powers granted by the laws of the State to corporations of that character, including all rights of condemnation and the right to sell and dispose of the surplus electric power generated at its plant. It

has also a somewhat general authority to construct buildings and factories, operate machinery, &c., but limited, as we understand it, to acts expedient for the proper prosecution of the objects for which the corporation was created.

This taking, according to the findings before us, was with intent in good faith to carry on the public business authorized by the charter—that is to build and operate a street and interurban railway between points named. It is found further that it was necessary to generate electric power on Green River in order to operate the railway; that the present proceeding was for a public use, and that in order fully to develop the Blue Ridge Company's water power on Green River for the above-mentioned purposes, it was necessary to condemn the rights in question. Subject to provisos that were held to have been satisfied and that are not in question here, a statute of 1907 as amended in 1913 authorized street and interurban railways situated as the petitioner was to condemn water power. The objection that is urged against this statute and the charter as applied in the present case is that taking the whole water power is unnecessary for the purposes of the railway, that the plan is a covert device for selling the greater part of the power to mills, that this last is a private use, and that the two objects being so intermingled the taking must fall.

We are asked to go behind the finding that the taking was for a public use, on the ground that the charter authorizes the sale of surplus power, that the contemplated works will produce fifty thousand horse-power and that this, according to the evidence, is much more than will be needed for the railway. But the surplus is a matter of estimate and no reason is shown for our not accepting the findings below. We are in no way warranted in assuming that the sale of surplus power, if there is any, is the real object of the enterprise, or anything more than a

possible incident, necessary to prevent waste, of the primary public use. Furthermore if there are likely to be such sales, nothing appears sufficient to take the case out of the scope of a recent decision of this court. *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U. S. 30, 32.

Judgment affirmed.